

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON :10.04.2018

PRONOUNCED ON:19.04.2018

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN
S.A.No.1009 of 2004
and
C.M.P.No.7409 of 2004

Ramaswami

... Appellant

Vs.

Ayenana

... Respondent

Prayer: Second Appeal filed under Section 100 of C.P.C., against the judgment and Decree dated 22.10.2002 made in A.S.No.2 of 2002 on the file of the Principal District Court, Erode confirming the judgment and decree dated 03.10.2001 made in O.S.No.398 of 2000 on the file of the Additional District Munsif Court, Erode.

For Appellant : Mr.S.Kaithamalai Kumaran

For Respondent: Mr.S.Thangavel

J U D G M E N T

This second appeal is directed against the judgment and decree dated 22.10.2002 made in A.S.No.2 of 2002 on the file of the Principal District Court, Erode confirming the judgment and decree dated 03.10.2001 made in O.S.No.398 of 2000 on the file of the First Additional District Munsif Court, Erode.

2. The second appeal has been admitted on the following substantial question of law.

"When both the appellant and the respondent's vendor have purchased undivided shares of property from a common vendor with specific right of access by means of the suit cart track, whether this easement by grant can be said to be no longer existing when the respondent's vendor sells his share to the respondent herein?"

3.Considering the scope of issue involved in this matter lying in a narrow compass, it is unnecessary to dwell the facts of the case in detail. The appellant has laid the suit for the reliefs of declaration, mandatory injunction and permanent

injunction as regards the suit cart track shown as "ABCD" in the plaint plan.

4.As far as the ownership of the properties acquired by the parties involved in the matter, there is no dispute as such. Materials placed on record and also admitted by the parties concerned, it is found that the survey No.732 of Punjai Kalamangalam village corresponding to R.S.No.8/1,2 and 3 measured an extent of 1.37 acres and it is seen that the common half share measuring 68 ½ cents in the same belonged to one Valliammal and her sister. It is found that the appellant had purchased half share in the abovesaid 68 ½ cents belonging to Valliammal's sister i.e., from the legal heirs of Valliammal's sister, by way of a registered sale deed dated 19.06.1964. Similarly, it is found that the appellant's brother had purchased the remaining half share of the above said 68 ½ cents from Valliammal, by way of registered sale deed dated 07.07.1964. The above said sale transactions are not in dispute. Now, according to the appellant, he and his brother partitioned their purchased properties and it is the case that he was allotted the western half share and his brother had been given the eastern half share and accordingly, it is his case that they are enjoying their respective shares. It is found that, the respondent has purchased the share belonging to the appellant's brother, by way of a registered sale deed dated 04.07.2000. Even as regards the same, there is no serious dispute.

5.Now, it is found that as per the materials placed on record, the appellant's property is situated in S.F.No.8/2 and the property purchased by the respondent from the appellant's brother is situated in S.F.No.8/3. Claiming that there is a cart track in the respondent's lands as shown in the plaint plan, the appellant has come forward with the suit complaining that the respondent had illegally obliterated the cart track in the "CD" portion and on that basis sought for the necessary reliefs in the suit.

6.The respondent had in toto disputed the existence of any cart track in his property and according to the respondent, at no point of time, the cart track has been in existence in the property and it is the specific case of the respondent that the cart track exists only in R.S.No.12 and accordingly, the appellant would be entitled to use the suit cart track in R.S.No.12 and thereafter use the ridges available in the lands for having access to his property and therefore, the respondent's defence is that the appellant has come forward with the present suit, on imagination, as if, the cart track is available in the respondent's property.

7.In the light of the above position and the specific -

defence taken by the respondent, it is for the appellant to establish that the cart track is in existence in the property acquired by the respondent from the appellant's brother, which document has come to be marked as Ex.B2. As rightly determined by the Courts below, it is found that the reference about the cart track in the documents purchased by the appellant is not shown to be relating to the alleged cart track in the property of the respondent. As rightly seen, if really, the cart track had been in existence in the property of the respondent, the same would extend not only through the appellant's property but also extend further west to R.S.No.8/1, lying on the western side. However, according to the appellant, there is no continuity of the cart track from his land to S.F.No.8/1 and this itself would go to show that the plea put forth by the appellant that the cart track had been in existence in the property purchased by the respondent as such is false. As rightly determined by the Courts below, from the FMB's marked in this case, it is found that the cart track is available only in R.S.No.12 as well as in other survey numbers as discussed and pointed out by the Courts below and accordingly, if there had been a cart track in existence in R.S.No.8/3, the same would have been reflected in the FMB and RSR extract. However, it is found that the appellant has not chosen to place any material worth acceptance to establish that the cart track had been in existence right from the beginning in R.S.No.8/3. Accordingly, it is found that if any such cart track had been available or in existence in R.S.No.8/3, the same would extend to the appellant's property as well as the other survey number adjoining to in R.S.No.8/1. But, when it is seen that the appellant's case itself is that the cart track does not proceed further from his property only belie the appellant's case that the cart track had been in existence in the respondent's property.

8.As rightly found by the Courts below, when the appellant and the respondent has purchased a small fraction of the property in the suit survey, to contend that even in the small fraction, the cart track had been in existence for their access as such cannot be believed and accordingly, when it is found that, as noted by the Courts below, as per FMB and RSR extracts, the existence of cart track is noted in the surrounding, lands as detailed in the judgment of the trial court and when there is no proof placed by the appellant to show that the cart track is available in the respondent's property, as rightly determined by the Courts below, the appellant has miserably failed to establish the existence of the cart track in R.S.No.8/3. On the other hand, it is found that the cart track is available only in R.S.No.12/1 up to the starting point of R.S.No.8/3 and accordingly the parties are further to make use of the ridges for reaching their respective lands. As rightly found by the

Courts below, merely because during non-agricultural seasons, the parties had been permitted to have access through the respondent's lands that by itself would not lead to the conclusion that the cart track is in existence right from the inception in the respondent's property. Considering the small fraction of the properties owned by the respective parties, as rightly put forth and also determined by the Courts below, for each small fraction of land, one could not accept the availability of the cart track for the access to their respective lands and if that be so, as rightly put forth, no agricultural operation could be carried in the small fraction of the land and in such view of the matter, it is found that the Courts below have rightly come to the conclusion, that the appellant has failed to establish the existence of any cart track in the respondent's property and resultantly, dismissed the suit laid by the appellant.

9.The Advocate Commissioner's report and plan would not in any manner be useful to sustain the case of the appellant as when it is seen that the traces of the cart track noted by the Advocate Commissioner is not found to be extending throughout and in such view of the matter, it is seen that on that basis, we cannot hold that the cart track had been in existence in the respondent's property. Similarly, the traces of tyre marks as noted by the Advocate Commissioner in R.S.No.8/3 by itself would not lead to the conclusion, as to the existence of the cart track. In addition to that, when it is found that the R.S.No.8/3 and 8/2 are distinguished by the north-south ridge accordingly, it is found that there is no scope for any cart track available in RS.8/3 for using the same as an access to the appellant's property in RS.8/2 and in such view of the matter, the Advocate Commissioner's report and plan as rightly determined by the Courts below, would not serve the case of the appellant.

10.Only on the establishment of the existence of the cart track in R.S.No.8/3, the question would arise as to whether the appellant would be entitled to use the same and the nature of the right to which the appellant would be entitled there to. When in this case, there is no material placed to hold that there existed a cart track in R.S.No.8/3 and on the other hand, the cart track is found to be available only in RS.12/1 which ends at the starting point of R.S.No.8/3 and when the appellant has failed to establish the alleged cart track as such and further when the revenue records point out the existence of the cart track in the surrounding, lands and not in respect of Rs.8/3, no interference is called for in the conclusion of the Courts below in holding that the appellant has miserably failed to establish the existence of the cart track. In such view of the matter, the Courts below had rightly declined the reliefs

sought for by the appellant.

11.The appellant's counsel in support of his contention placed reliance upon the decisions reported in 2016 (5) Law weekly 616 [T.V.Ravi Vs. B.R.Mohan & Others], Volume 81 Law weekly 95[Palaniswami Naicker Vs. Chinnaswami Naicker]. The principles of law expatiated in the abovesaid decisions are not in dispute. However, only on the establishment of the existence of the cart track, the appellant would be entitled to seek the right in respect of the same on the footing that the transfer of the property also encompasses the eastmentary right available in the property. However, in so far as this case is concerned, when the very existence of the cart track itself has not been proved, it is seen that the above said decisions would not be useful to sustain the appellant's case.

12. In the light of the above discussions, it is found that no substantial question of law is involved in this second appeal. When the appellnat and his brother had acquired properties as above discussed and accordingly, when the materials placed on record go to show that the suit cart track is not at all in existence and in such view of the matter, the appellant cannot seek to enforce the right as regards the non-existing cart track and accordingly, the substantial questions of law formulated in the second appeal is answered against the appellant and in favour of the respondent.

13.For the reasons afore stated, the second appeal fails and is accordingly, dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-

Assistant Registrar(CS V)

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Sub Assistant Registrar

mfa

To

1. The Principal District Judge,
Principal District Court,
Erode.

2.The Additional District Munsif,
Additional District Munsif Court,
Erode.

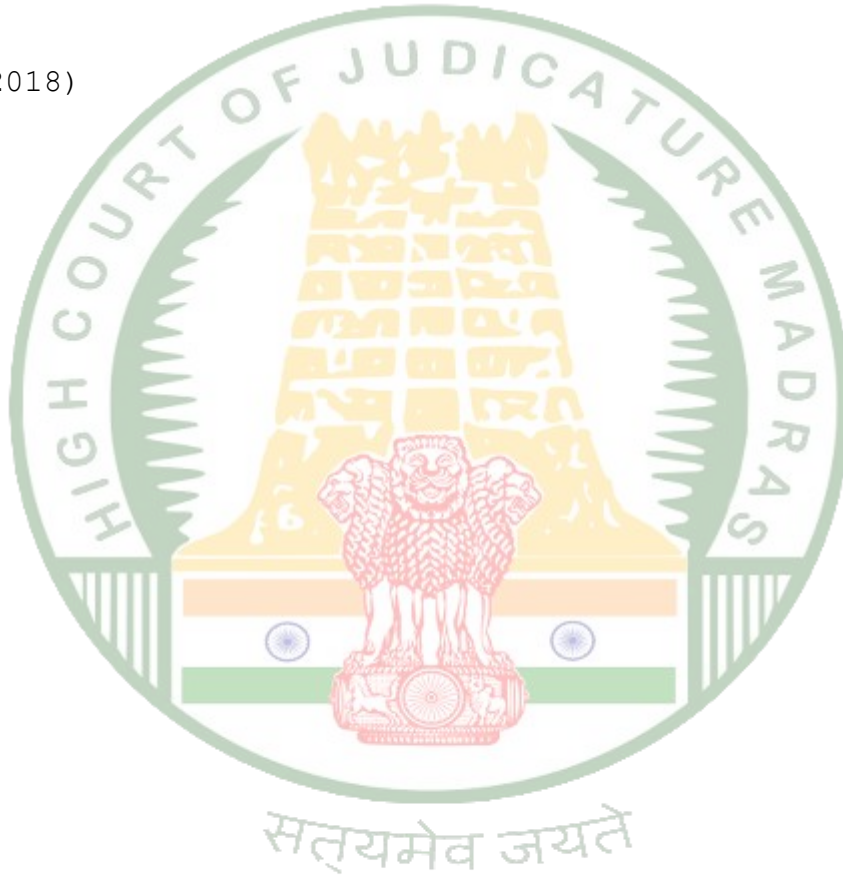
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3.The Section Officer,
VR Section,
High Court.

+1cc to Mr.S.Kaithamalai Kumaran, Advocate SR.No.29020

S.A.No.1009 of 2004

KS (CO)
GN(18/05/2018)



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