

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 07.03.2019

PRONOUNCED ON : 29.03.2019

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S.A.No.1316 of 2005

Saravanan

...Appellant

vs.

1. Veeraiyapandaram
2. Annamalai

...Respondents

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 29.11.2004 in A.S.No.26 of 2004 on the file of Additional Sub Judge, Salem, confirming the judgment and decree dated 12.01.2004 in O.S.No.193 of 1998 on the file of the Principal District Munsif, Salem.

For Appellant : Mr.S.Kalyanaraman

For Respondents: No representation / No appearance
set exparte vide order dated 07.03.2019.

JUDGMENT

In this second appeal, challenge is made to the judgment and decree dated 29.11.2004 passed in A.S.No.26 of 2004 on the file of Additional Subordinate court, Salem, confirming the judgment and decree dated 12.01.2004 passed in O.S.No.193 of 1998 on the file of the Principal District Munsif court, Salem.

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

"Have not the courts below committed an error of law in granting an absolute right of injunction in respect of the suit property as prayed for in favour of the plaintiff, when over the suit property, the defendant has a right of way by way of a 'grant' under Exs.B1 and B2?

3. Considering the scope of the issues involved between the parties as regards the subject matter lying in a narrow compass, it is unnecessary to dwell into the facts of the case in detail.

4. The Parties are referred to as per their rankings in the trial Court for the sake of convenience.

5. Suffice to state that the plaintiffs have laid the suit against the defendants for the relief of permanent injunction, mainly, putting forth that the plaintiffs had acquired title to the suit property by way of a settlement deed dated 07.09.1962 executed by the second plaintiff's grand mother in favour of the second plaintiff. According to them, the suit property has been in their possession and enjoyment and the defendants, without any authority or entitlement, on account of refusal of the plaintiffs to sell their property to them developed enmity and attempted to interfere with their possession and enjoyment and hence put forth the case that they had been necessitated to lay the suit for the relief of permanent injunction against them.

6. The second defendant, who is the contesting party as such, has not challenged the title of the plaintiff to the suit property based on the settlement deed 07.09.1962 marked as Ex.A1. Mainly it is put forth by the second defendant that he has the right of cart track / pathway in the suit property by virtue of the sale deed dated 24.09.1942 marked as Ex.B2 as well as sale deed dated 06.09.1993 marked as Ex.B1 and therefore, according to him, when he is having the right of pathway / cart track over the suit property by way of easementary right by prescription, by grant and by way of necessity, depriving the same, the plaintiffs cannot be allowed to enjoy the suit property restraining his use and enjoyment of the pathway / cart track running over the same and accordingly sought for the dismissal of the plaintiffs' suit.

7. The courts below, on an appreciation of the materials placed on record, found acceptance with the plaintiffs' suit and accordingly granted the relief sought for by the plaintiffs. Impugning the same, the second appeal has been laid.

8. The materials placed on record go to show that Nallu pandaram and Arumuga pandaram are brothers and it is seen that Arumuga Pandaram had two wives and through his first wife Arumuga pandaram had one son by name Kulandaivel Pandaram. It is further seen that Kulandaivel Pandaram had two children namely, Natarajan and Sarasu, who is the second plaintiff. Natarajan had died without marriage. The first plaintiff is the husband of the second plaintiff Sarasu. The second wife of Arumuga Pandaram namely, Thayammal alias Amirthammal also had no issue and according to the plaintiffs, she had executed a settlement deed in favour of the second plaintiff on 07.09.1962 in respect of the suit property marked as Ex.A1. This is how

the plaintiff traces the title to the suit property.

9. As could be seen from the materials placed on record, Nallu Pandaram's wife Angammal had executed the sale deed in favour of the second defendant's grand father Karumalai Paddayachi on 24.09.1942 marked as Ex.B2 in respect of the property comprised therein. According to the second defendant, in the abovesaid sale deed, the right of pathway / cart track has been given and accordingly, he is entitled to enjoy the same and the same could not be disturbed by the plaintiffs by filing the present suit. Furthermore, as abovenoted, the second defendant also claimed the right of pathway / cart track in the plaintiffs' property on the strength of the sale deed dated 06.09.1993 marked as Ex.B1 which is found to have been executed by Saraswathi and her children in favour of the second defendant. However, it is mainly found that the defendant based his claim of usage of pathway/cart track in the plaintiffs' property on the strength of the sale deed dated 24.09.1942 marked as Ex.B2.

10. The defendant seeking the right of easement over the alleged cart track / pathway in the plaintiffs' property, should come forward with the specific case as to the nature of the easementary right which he seeks to enforce against the plaintiffs with reference to the same. In the written statement, the defendant had claimed the easementary right over the pathway on all modes i.e., by way of prescription, grant and also as of necessity very vaguely and without detailing as how and in what manner he seeks the abovesaid various easementary rights. As regards the right of easement claimed by the defendant by way of grant, as above noted, he mainly relied upon Ex.B2. In Ex.B2, the plaintiffs' predecessor in interest is not a party. Therefore, the recital contained therein would not, in any manner, bind the plaintiffs' predecessor in interest as well as the plaintiffs. On a perusal of the recitals contained in Ex.B1 sale deed, no doubt, there is a reference to the property acquired by the second defendant's grand father Karumalai Padayachi about the mamool cart track / pathway for gaining access to the ittery. However, there is no mention in the said document as to where the above referred to mamool cart track / pathway lies, whether it lies in the property belonging to the plaintiffs or elsewhere or in the property conveyed to Karumalai Padayachi under Ex.B2. The same is described as lying to the east of Perianna Padayachi's land and if really there had been a well marked cart track / pathway in the plaintiffs' property as now sought to be made out by the second defendant, the recitals pointing to the same would have been specifically spelled out in Ex.B2 sale transaction. On the other hand, the property conveyed under Ex.B2 is found to be located within the specific boundaries and reference about the mamool cart track / path way has not been clearly mentioned therein as to where the same lies, through which land the same passes through and

whether it passes through the plaintiffs or their predecessor in interest land and in the absence of any indication contained in the document pointing to the same, on the basis of the abovesaid bare recitals contained in Ex.B2, as rightly put forth by the plaintiffs before the courts below and rightly determined by the courts below, the second defendant cannot be allowed to claim the right of cart track / pathway to his property in the plaintiffs' property by way of Ex.B2. As above noted, neither the plaintiffs nor the predecessor in interest are the parties in Ex.B2 transaction. Therefore, the recitals contained therein, would not be binding upon the them.

11. If really, there had been any cart track / pathway in existence in the plaintiffs' property, definitely, there would have been reference about the same in the settlement deed executed in favour of the second plaintiff by Thayammal alial Amirthammal. On the other hand, there is no reference at all about any cart track / pathway in the property comprised in Ex.A1 and this would only go to show that inasmuch as no such cart track / pathway had been in existence in the plaintiffs' property, the same has not been adverted to in the said document. Furthermore, when the plaintiffs had endeavoured to produce the title deed of Angammal in respect of the property covered under Ex.B1 by producing the anterior sale deed in the name of Angammal dated 06.06.1938 marked as Ex.A12, and when on a perusal of Ex.A12, absolutely there is no reference about the existence of any mamool cart track / pathway for gaining access to the property comprised therein, it does not stand to reason as to how Angmmal, while conveying the property to Karumalai Padayachi by way of Ex.B2, could recite that inclusive of the mamool cart track / pathway she had conveyed the property. It is thus found that without any entitlement or authority, the vendor of Ex.B2 had recited about the existence of mamool cart track / pathway in the document and inasmuch as no such cart track / pathway had been in existence at any point of time, she has not endeavoured to give the details of the same in the said sale deed. The abovesaid reasoning also gets reinforced when it is noted that while the said property is conveyed to Angammal under Ex.A12, no such reference about the existence of mamool cart track / pathway has been mentioned therein. Therefore, the claim of the second defendant that he has the right of cart track / pathway over the plaintiffs' property covered under Ex.A1 cannot be accepted in any manner and the same had been rightly rejected by the courts below.

12. As regards the sale deed marked as Ex.B1, it is pertaining to the property lying to the north of the suit property and therein also, there is no reference about the existence of any cart track / pathway in the plaintiffs' property covered under Ex.A1 and furthermore, the abovesaid document does not recite that the mamool cart track / pathway extends upto the Angammal's land and therefore, the abovesaid

document would be of no use to sustain the defence version of the second defendant.

13. The commissioner's report and plan marked in the proceedings as Exs.C1 to C4 seen cumulatively, would go to disclose that the second defendant is having access to his property through other ways and therefore, the claim of the second defendant that he is entitled to use the cart track/pathway in the plaintiffs' property by way of easementary right on the ground of necessity also falls to the ground.

14. From the defence version projected by the defendants, it is mainly seen that he has sought for the right of cart track / pathway in the plaintiffs' property only for gaining access to the house portion in his property. However, when the second defendant's grand father had acquired the property by way of Ex.B2, no house had been in existence in the said property and only the land had been conveyed and hence to say that the defendant's predecessor had been using the alleged cart track / pathway for reaching the house portion since Ex.B2 sale transaction, cannot be countenanced in any manner and the same has been rightly taken into consideration by the courts below and rejected the defence version.

15. If really the second defendant and his predecessor in interest had been exercising any right of easementary over the alleged cart track / pathway in the plaintiffs' property and if the plaintiffs had taken any steps to prevent the second defendant from exercising such a right, as a prudent person, if really according to the second defendant, he has a valid right of easement over the alleged cart track / pathway in the plaintiffs' property, the defendant would have put forth the requisite counter claim in the written statement claiming his right over the alleged cart track / pathway by seeking appropriate reliefs. On the other hand, the defendant is found to have not made any counter claim for enforcing his alleged right of easement over the so called cart track / pathway running in the plaintiffs' property and the abovesaid factor also would go to show that inasmuch as no such right had been exercised by the second defendant in the plaintiffs' property at any point of time and as no such cart track / pathway had been in existence in the plaintiffs' property at any point of time, it is seen that the defendant has not endeavoured to seek any reliefs with reference to the same in the written statement by way of a counter claim.

16. In the light of the abovesaid discussions, as rightly determined by the courts below when the second defendant has failed to establish the existence of the cart track / pathway in the plaintiffs' property and his entitlement to use the same as easementary right as put forth in the written statement and when the abovesaid case projected by the defendant is not supported by materials projected by the defendant as above discussed and

when it is seen that the defendant has other access to his property and the physical features obtaining in the properties belonging to the parties do not indicate the existence of a regular cart track / pathway in the plaintiffs' property and as rightly pointed out by the courts below, even the so called cart track / pathway said to be running in the plaintiffs property is found to be full of pits and holes and not a regular pathway as such, as could be seen from the commissioner's report and plan and in all, when it is found that, particularly, the second defendant has not come forward clearly as to the nature of the easementary right which he seeks to enforce with reference to the same and also not placed reliable materials to sustain his claim, in all, it is seen that the courts below had correctly assessed the materials placed on record and determined that the second defendant has no right of pathway or cart track over the plaintiffs' property by way of easement by grant, by way of necessity or by prescription. In this connection, a useful reference may be made to the decision of the Apex Court reported in (2008) 17 SCC 491 (Bachhaj Nahan Vs. Nilima Mandal and Anr). Therefore, the judgment and decree of the courts below do not merit any interference. The substantial question of law formulated in this second appeal is accordingly answered against the second defendant and in favour of the plaintiffs.

17. In conclusion, the second appeal fails and is accordingly dismissed. No costs.

Sd/-

Assistant Registrar (CS-VI)

//True Copy//

Sub Assistant Registrar

bga

To

1. Additional Subordinate court, Salem.
2. Principal District Munsif court, Salem.

Copy to

The Section Officer,
V.R.Section, High Court, Madras.

+lcc to Mr.S.Kalyanaraman, Advocate, S.R.No. 30240

S.A.No.1316 of 2005

KS (CO)
GN(13/06/2019)