

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :22.04.2019

Pronounced on :26.04.2019

CORAM

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

Second Appeal No.824 of 2011 &
M.P.No.1 of 2011 & C.M.P.No.21667 of 2017

D.Jeyabal ... Appellant/Appellant/Plaintiff

Vs

1. S.Chitra
2. Saravanan
3. Govinda Udayar
4. Rajammal
5. Jayaraj ... Respondents/Respondents/Defendants

Prayer :- Second Appeal has been filed under Section 100 of C.P.C. against the judgment and decree dated 16.03.2011 in A.S.No.28 of 2008 on the file of the Subordinate Court, Harur (A.S.No.33 of 2007 on the file of Sub Court, Dharmapuri) confirming the judgment and decree dated 10.08.2007 passed in O.S.No.19 of 2004 on the file of the District Munsif Court, Harur,

For Appellant : Mr.P.Valliappan

For Respondents: Mr.R.Chandrasekaran

JUDGMENT

Aggrieved over the concurrent finding of the Courts below in dismissing the suit filed for declaration and permanent injunction, the second appeal has been filed.

2. The parties are arrayed as per their own ranking before the trial Court.

3. The brief facts of the plaintiff case is as follows :

The suit property is a car track. Originally the property in Survey No.12/1B to an extent of 2.29 acre with one well and electric motor pumpset belong to one Shanmugam son of late Muthugounder. The Shanmugam and his mother Athayeeammal sold 0.10 acre for car track and half right in the well to one Subramani and his wife Alamelu by a registered sale deed dated 20.02.1995. The remaining land in the above said property was sold by Shanmugam, his mother Athayeeammal, brother Subramani and their minor children to one Muthulakshmi through a registered sale deed dated 20.02.1995. In the above properties, the plaintiff had purchased the suit property and other lands from the said Subramani and his wife Alamelu and their minor children and the said Muthulakshmi through a registered sale deed dated 09.05.95. The plaintiff is enjoying the car track ever since the date of purchase to reach his land along with his vendor. The plaintiff has no other road except the suit road to reach his lands. The plaintiff's vendor Muthulakshmi, her husband Shanmugam and the first defendant joined together and created some documents for suit survey number 12/1B. The defendants have no right to cause disturbance to the plaintiff's possession and enjoyment of the property. On 11.01.2004, the defendants have illegally attempted to encroach a part of the suit property to annex with their land to prevent the passage of the plaintiff through the suit property car track. Hence, the suit for declaration to declare easementary right and consequential injunction.

4. Denying that the plaintiff has purchased the property, it is the contention of the defendants that other than the suit property, there is other pathway to the plaintiff and the plaintiff has an alternative pathway to reach his land. The alleged encroachment is also denied.

5. The trial Court framed the following issues :

1. Whether the plaintiff is entitled for easementary declaration over the suit property?

2. Whether the plaintiff is entitled for permanent injunction?

3. Whether it is true that there is car track as pleaded by the defendants?

4. To what relief the plaintiff is entitled?

6. In the trial Court, on the side of the plaintiffs P.W.1 was examined and Ex.A.1 to Ex.A.3 were marked. On the side of the defendants, D.W.1 and D.W.2 were examined and Ex.B.1 to Ex.B.3 were marked.

7. The trial Court has dismissed the suit. The first appellate Court confirmed the finding of the trial Court. The first appellate Court has appointed a Commissioner and taking note of the fact that after the CD portion shown in the Commissioner Report there is fence on the western side of the plaintiff's land and concluded that there is no pathway and also held that Plaintiff can reach his land through the Government lake. Hence, dismissed the appeal. As against which, the present second appeal has been filed.

8. The following substantial question of law have been formulated in this Second Appeal :

i) Whether the Courts below are correct in law in non-suiting the appellant, especially when he had established his right over the suit pathway by means of Ex.A.1 to Ex.A.3 material documents?

ii) Whether the Courts below are correct in law in discarding Ex.A.3 Sale Deed dated 09.05.1995, without any justifiable reasons?

iii) Whether the Court below are correct in law in ignoring the admissions made by D.Ws.1 and 2, which would amply prove the case of the appellant?

iv) When the appellant is entitled to the suit pathway both under Ex.A.3 Sale Deed dated 09.05.1995 and by way of easement of necessity, whether the Courts below are correct in law in dismissing the suit claim on flimsy grounds?

v) Whether the Lower Appellate Court is correct in law in misconstruing Ex.C.1 and C.2, Commissioner's Report and plan?

vi) When the respondents had not disputed the veracity of Ex.A.1 to A3, in their written statement, is it open to them to take a contrary stand later on?

vii) In the absence of pleadings, whether the respondents can be permitted to let in evidence in the form of Ex.B1 to B3, when it is axiomatic that no amount of evidence can be let in to prove a plea, which is not raised?

9. The learned counsel appearing for the appellant has contended that the Courts below had failed to appreciate the documentary evidence Ex.A.1 to Ex.A.3 and Ex.B.1 to Ex.B.3 and simply relied upon the oral evidence and dismissed the suit holding that the appellant can reach his land through Government poromboke lake and such approach of the Courts below is not based on proper appreciation of documents and evidence and hence, submitted that when the right has been given under the documents, the subsequent purchaser cannot deny such right granted under the documents. It is his further contention that even in the written statement it is not pleaded that there is no car track and in the absence of any pleading, the first appellate Court coming to the conclusion that the plaintiff can reach his land alternatively is erroneous. Hence, submitted that the Courts below have failed to appreciate the documents properly. In support of his contentions, he also relied upon the following judgments :

M.Singama Reddiar Vs. Eramallu Gounder reported in 1993 -3 - L.W.526

Hero Vinoth (Minor) Seshammal reported in 2006 (4) CTC 79

Ponnan and others Vs. Peraman and another reported in 2006 (5) CTC 573

Sree Swayam Prakash Ashramam and another Vs. G.Anandavally Amma and others reported in 2010 (1) CTC 455

P.Dhaanakodi and others Vs. Alamelu reported in 2011 - 2 - L.W.572

The Nurses Association (Reg). rep. by its Secretary Vs. Shree Vepery Swetambar Murthi Pujak Jain Singh and others reported in 2014 (2) MWN (Civil) 785

Smt.Jayanti Kar and another Vs. Dillip Kumar Patnaik and others reported in AIR 2016 Orissa 14

N.Periyasamy and others Vs. P.Arumugham and others reported in 2017 (1) MWN (Civil) 30

10. Whereas, the learned counsel for the respondents would submit that the first appellate Court has rightly found that there is an alternative pathway. Further, the sale under Ex.A.3 is also not properly established. The Courts below concurrently found that the documents have not been established and the right of way has not been granted. Hence, submitted that the appeal is liable to be dismissed. In support of his contentions, he relied upon the judgments in Jasmine Ennasi Vs. Ehaiyalanayagi

Ammal and others reported in 2019 (2) CTC 745 and Koolan @ Munusamy Vs. Chennammal reported in 2019 (2) CTC 397.

11. I have perused the entire materials. The suit has been filed to declare right over the car track. Ex.A.1 makes it very clear that the land measuring to an extent of 2.19 acres out of 2.29 in Survey number 12/B1 of Maveripatti village Arur Taluk was originally sold by one Subramani and Alamelu in favour of one Muthulakshmi wife of Shanmugam. Ex.A.1 clearly indicate that she had retained 10 cents of car track and sold only 2.19 acres. Under Ex.B.1 sale deed on the same day, the said Athayeeammal and her son Shanmugam have sold to an extent of 1.50 acres in Survey No.11/1A, 11/1B, 11/1C and 10 cents in 12/1B in favour of one Subramani and his wife Alamelu. It is to be noted that both the documents Ex.A.1 and Ex.B.1 have been executed on the same day. Under Ex.A.1 10 cents land in S.No.12/1B towards common pathway was retained by the vendors. In the subsequent document under Ex.B.1, 10 cents retained under Ex.A.1 is sold in favour of one Subramani and Alamelu. Ex.A.2 sale deed dated 22.03.1995, the purchaser under Ex.B.1 namely Subramani and Alamelu have sold to an extent of 10 cents to one Muthulakshmi wife of Shanmugam. In view of such purchase, the said Muthulakshmi, who has purchased under Ex.A.1 became entitled to the entire extent of 2.29 acres in Survey No.12/1B. Thereafter on 09.05.1995, the purchaser in Ex.A.2 and Ex.B.1 joined together, i.e., Subramani and his wife Alamelu and their children and Muthulakshmi, jointly executed a sale deed in favour of the plaintiff under Ex.A.3. The plaintiff had purchased lands in Survey No.11/1A, 11/1B, 11/1C along with right of way in 12/1B and the above right of way is meant as an access to reach the property purchased in Survey Nos.11/1A, 11/1B and 11/1C.

12. A conjoint reading of Ex.A.1 and Ex.A.2 and Ex.A.3 and Ex.B.1, clearly indicate that 10 cents is always meant for car track. The above right has been specifically conferred under Ex.A.1 and Ex.A.2 have been conveyed to Muthulakshmi. In Ex.A.3 also the pathway south west 17 ft., east west 20 ft. and east west 40 ft. and south west 12 ft has been clearly mentioned. Thereafter, in the year 2003 under Ex.B.7 sale deed dated 26.03.2003, the vendor of the appellant, Muthulakshmi and her husband Shanmugam entered into an agreement in favour of the first respondent for sale of 2.29 acres in Survey No.12/1B. When the above agreement, when carefully seen, the right of way has been clearly mentioned. Thereafter, on 02.06.2003, under Ex.B.3 sale deed an extent of 2.29 acres in Survey No.12/1B has been conveyed in favour of the defendant. In the above document, the right of way has also been given to the plaintiff.

In Ex.A.1, Ex.A.2, Ex.A.3, Ex.B.1 and Ex.B.2, when the right of way has already been granted to the plaintiff in the year 1995, in the subsequent document of the year 2003, the defendant cannot contend that there is no right of way available and the plaintiff has an alternative right of way.

13. It is to be noted that except stating that alternative pathway is available in the entire written statement, there is no whisper about where the alternative pathway is available to reach the plaintiff's land. Further, the first appellate Court merely on the basis of Ex.B.2 sale deed has come to the conclusion that there is no pathway only 10 cents alone mentioned as per the Commissioner's report and concluded that there is no pathway in the CD portion in the Commissioner's report and therefore, come to the conclusion that the plaintiff has not established his case. It is to be noted that merely because, the right of way has not been specifically mentioned in Ex.A.2 document, it cannot be concluded that there is no pathway. In fact, the purchaser under Ex.B.2 is also made a party in Ex.A.3 sale deed, wherein, the right of way has been clearly mentioned. The intention of making the purchaser as a party in the sale deed makes it very clear that for the purpose of car track, she was made as a party and sold the properties and the right of way in 12/1B was given to the plaintiff to reach his land situated in Survey Nos.11/1A, 11/1B and 11/1C. Therefore, merely because, the pathway has not been shown in Ex.B.2, and only 10 cents has been sold to Muthulakshmi, it cannot be construed that there is no pathway. On the other hand, Ex.A.1, Ex.A.2, and Ex.A.3 clearly establish the pathway. The defendants have purchased the property in the year 2003. The subsequent purchaser cannot contend that there was no such grant given by the vendor in favour of the plaintiff. The Commissioner Report only makes it clear that at a certain point after CD shown in the plain, there is only fence and pathway is not in use. That itself cannot be a ground to deny the right already granted under the sale deed of the year 1995. It is not the case of the defendants that the pathway was abandoned and became extinguished. No such plea has been taken in the written statement. Even the Commissioner Report clearly indicate that only in the Government Maveri lake, the plaintiff can reach his property. It is to be noted that whenever, the lakes are full, it will be very difficult to reach the plaintiff's land. Therefore, it cannot be stated that the lake of Maveri at all times used an access to the plaintiff's land.

14. In this regard, it is useful to refer the judgment of this Court in Jasmine Ennasi Vs. Thaiyalnayagi Ammal and others reported in 2019 (2) CTC 745, wherein this Court has held as follows :

"29. Therefore, by necessity, the respondents are entitled for passage through C schedule property. The extent of passage has already been prescribed under Ex.A3. The appellant, who is the subsequent purchaser of the servient tenement cannot diminish the right of access of the dominant tenement merely because his sale deed does not disclose about the passage. Though the easement by prescription, which was considered in favour of the respondents by the Courts below may not be correct, since the respondents have not proved the existence of passage prior to his purchase in the year 1974, however, having proved his right of easement by grant and necessity, the finding of the Courts below needs no interference. Hence, the first Substantial Questions of Law is answered against the appellant."

15. In the judgment in Koolan @ Munusamy Vs. Chennammal reported in 2019 (2) CTC 397, this Court had referred to the car track in a sale deed held that same is binding irrespective of whether alternative access exists or not.

16. In the judgment in M.Singama Reddiar Vs. Eramallu Gounder reported in 1993 -3 - L.W.526, it has been held as follows :

"13. Learned counsel for the respondent contended that the plaintiff never exercised right of easement and that he allowed the defendant to repair the building and that the conduct of the plaintiff will amount to abandonment of easementary right. In support of the same, he also relied upon a decision reported in Varadarajulu V. Muthukannu Ammal (AIR 1966 Madras 158 = 78 L.W.632). The above decision will not assist the case of the defendant in any way, since the defendant failed to produce the sale deed in his favour (sic). Further it is not clear whether the present building was in existence even on the date when the defendant purchased the property. It is also not clear whether the defendant had put up pucca building after purchase. In the absence of any such materials, it cannot be contended that the conduct of the plaintiff in allowing the defendant to effect repairs by incurring expenses would amount to estoppel. It is not proper for the appellate Court to give a finding on one or two admissions made by the plaintiff in the evidence. The entire evidence, both oral and documentary, should be considered in proper

perspective for giving a finding on the question whether the plaintiff is entitled to get right of pathway. In this case, the right of way has been expressly conferred on the plaintiff under Ex.A.1 and Ex.A.2. In *Maneklal V. Maneklal* (AIR 1932 Bombay page 574), it is held that where a right of way granted under an award was a passage for ingress and egress with all its connected rights, it is a grant of a general right of way. In *Annapurna V. Santosh Kumar* (AIR 1937 Calcutta page 661), it is held thus :-

"Where an owner of land sells a portion of it and the deed of conveyance and the plan annexed to it do not describe certain boundary of the portion sold as *ijmali* land of the vendor nor even a common passage of the vendor and his co-sharers but describes it as common passage generally, a grant of the right of passage may be presumed on the principle akin to estoppel and the grantor cannot derogate from this position and say that it was a passage meant for the vendor alone and not for the vendee."

14. The fact that the right of way is not mentioned in Ex.B.1, would not affect the case of the plaintiff, since the right of way was already conferred on the plaintiff under Ex.A-1 and A-2. In *Mohammad Asaraf v. Kulasekaraperumal Pillai* (87 L.W. 874), it is held thus :-

"Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property and in the legal incidents thereof - S.8 of the T.P. Act."

In *Govindarajulu Chettiar V. Srinivasaly Naidu* (85 L.W. 296), it is held that the question whether a grant can be implied or not would only arise in a case where there is no express grant. In this case, the original owner of the property has expressly granted right of pathway in its remaining properties. The plaintiff is entitled to exercise the said right when it becomes necessary. The plaintiff has claimed decree for declaration that he has got right to take cattle and use the suit property. It is, thus, seen that the plaintiff is entitled to claim relief on the basis of express grant."

17. In *Hero Vinoth (Minor) Seshammal* reported in 2006 (4)

CTC 79, it has been held as follows :

"28. The question whether an easement is one acquired by grant (as contrasted from an easement of necessity) does not depend upon absolute necessity of it. It is the nature of the acquisition that is relevant. Many easements acquired by grant may be absolutely necessary for the enjoyment of the dominant tenement in the sense that it cannot be enjoyed at all without it. That may be the reason for the grant also. But easement of grant is a matter of contract between the parties. In the matter of grant the parties are governed by the terms of the grant and not anything else. Easement of necessity and quasi easement are dealt with in Section 13 of the Act. The grant may be express or even by necessary implication. In either case it will not amount to an easement of necessity under Section 13 of the Act even though it may also be an absolute necessity for the person in whose favour the grant is made. Limit of the easement acquired by grant is controlled only by the terms of the contract. If the terms of the grant restrict its user subject to any condition the parties will be governed by those conditions. Any how the scope of the grant could be determined by the terms of the grant between the parties alone. When there is nothing in the term of the grant in this case that it was to continue only until such time as the necessity was absolute. In fact even at the time it was granted, it was not one of necessity. If it is a permanent arrangement uncontrolled by any condition, that permanency in user must be recognized and the servient tenement will be recognized and the servient tenement will be permanently burdened with that disability. Such a right does not arise under the legal implication of Section 13 nor is it extinguished by the statutory provision under Section 41 of the Act which is applicable only to easement of necessity arising under Section 13.

29. An easement by grant does not get extinguished under Section 41 of the Act which relates to an easement of necessity. An easement of necessity is one which is not merely necessary for the reasonable enjoyment of the dominant tenement, but one where dominant tenement cannot be used at all without the easement. The burden of the servient owner in such a case is not on the basis of any concession or grant made by him for consideration or otherwise, but it is by way of a legal obligation

enabling the dominant owner to use his land. It is limited to the barest necessity however inconvenient it is irrespective of the question whether a better access could be given by the servient owner or not. When an alternate access becomes available, the legal necessity of burdening the servient owner ceases and the easement of necessity by implication of law is legally withdrawn or extinguished as statutorily recognized in Section 41. Such an easement will last only as long as the absolute necessity exists. Such a legal extinction cannot apply to an acquisition by grant and Section 41 is not applicable in such case.

30. Above being the position, the High Court was right in holding that the parties clearly provided for a right of access to the backyard of the defendant's house when the Partition deed was executed and shares were allotted to various sharers taking into account various factors and it is a matter of contractual arrangement between them. In such a contract if a right of way is provided to a particular sharer, it cannot be extinguished merely because such sharer has other alternative way. The High Court's reasoning and conclusions do not suffer from any infirmity to warrant interference."

18. In Ponnann and others Vs. Peraman and another reported in 2006 (5) CTC 573 it has been held that

"11. The contention of the learned counsel for the appellants that though in Ex.A-1 right of way has been given the same has been lost by the plaintiffs by non-user is not based on any pleadings. In the written statement such a plea has not been specifically taken and D.W.1's evidence also does not help the case of the defendants. The Courts below on a consideration of the recitals contained in Ex.A-1-sale deed have pointed out that from 1946 onwards a right on the north of S.F.No.307 has been given and on a consideration of Exs.C-1 and C-2 and on the basis of Ex.A-9 series the Courts below have recorded a finding about the existence of a common pathway on the ridge and have further pointed out that it runs up to the end of the Survey Nos.307/5 and 307/6. The Courts below have also pointed out that pursuant to Ex.A-1 the plaintiffs and their predecessors in

interest were enjoying the right over the common pathway without any hindrance right from 1946. The Courts below have pointed out that the right given under Ex.A-1 is an easement of grant expressly granted to the plaintiffs and the same is continuously being enjoyed by the plaintiffs. When the plaintiffs are claiming a right over the suit pathway as an easement of grant the Courts below have rightly pointed out that there is no need to consider the availability of alternative pathway to reach the plaintiffs lands.

19. In Sree Swayam Prakash Ashramam and another Vs. G.Anandavally Amma and others reported in 2010 (1) CTC 455 it has been held as follows :

"25. We have heard Mr. T.L. Viswanatha Iyer, learned senior counsel for the appellants and Mr. Subramaniam Prasad, learned senior counsel for the respondents. We have carefully examined the impugned judgment of the courts below and also the pleadings, evidence and the materials already on record. It is not in dispute that the trial court as well as the First Appellate Court concurrently found on a proper appreciation of the evidence adduced in the case that the 'B' Schedule Property of the plaint was being used by the original plaintiff (since deceased) and thereafter, by the respondents even after construction of the building in 1940 in 'A' Schedule property of the plaint. The appellants also did not dispute the case of the original plaintiff (since deceased) that he was in continuous occupation of the building even after its construction in the year 1940. It is also not in dispute that the appellants were not able to establish that the original plaintiff (since deceased) was using any other pathway for access to 'A' Schedule Property of the plaint and the building therein, which was in the occupation of the original plaintiff (since deceased). The case of the appellants that since there was no mention in the deed of settlement enabling the use of 'B' schedule pathway for access to 'A' schedule property and the building therein, cannot be the reason to hold that there was no grant as the grant could be by implication as well. It is not in dispute that the fact of the use of the 'B' schedule property as pathway even after execution of Exhibit A1, the settlement deed in the year 1982 by

the original plaintiff (since deceased) would amply show that there was an implied grant in favour of the original plaintiff (since deceased) relating to 'B' schedule property of the plaint for its use as pathway to 'A' schedule property of the plaint in residential occupation of the original plaintiff (since deceased). In the absence of any evidence being adduced by the appellants to substantiate their contention that the original plaintiff (since deceased) had an alternative pathway for access to the 'A' schedule property, it is difficult to negative the contention of the respondent that since the original plaintiff (since deceased) has been continuously using the said pathway at least from the year 1940 the original plaintiff (since deceased) had acquired an easement right by way of an implied grant in respect of the 'B' Schedule property of the plaint. It is an admitted position that both 'A' schedule and 'B' schedule properties of the plaint belonged to Yogini Amma and her disciples and it was the desire of Yogini Amma that was really implemented by the disciples under the settlement deed executed in favour of the original plaintiff (since deceased). Therefore, the High Court was perfectly justified in holding that when it was the desire of Yogini Amma to grant easement right to the original plaintiff (since deceased) by way of an implied grant, the right of the original plaintiff (since deceased) to have 'B' schedule property of the plaint as a pathway could not have been taken away. In Annapurna Dutta vs. Santosh Kumar Sett & Ors. [AIR 1937 Cal.661], B.K.Mukherjee, as His Lordship then was observed :

"There could be no implied grant where the easements are not continuous and non-apparent. Now a right of way is neither continuous nor always an apparent easement, and hence would not ordinarily come under the rule. Exception is no doubt made in certain cases, where there is a 'formed road' existing over one part of the tenement for the apparent use of another portion or there is 'some permanence in the adaptation of the tenement' from which continuity may be inferred, but barring these exceptions, an ordinary right of way would not pass on severance unless language is used by the grantor to create a fresh easement."

26. In our view, therefore, the High Court was also fully justified in holding that there was implied grant of 'B' schedule property as pathway,

which can be inferred from the circumstances for the reason that no other pathway was provided for access to 'A' schedule property of the plaintiff and there was no objection also to the use of 'B' schedule property of the plaintiff as pathway by the original plaintiff (since deceased) at least up to 1982, when alone the cause of action for the suit arose.

20. In P.Dhaanakodi and others Vs. Alamelu reported in 2011 - 2 - L.W.572, it has been held as follows

12. ... It is therefore pellucidly and palpably, obviously and axiomatically clear that the owner of the property bearing S.No.76/7B gave by grant in the form of sale deed Ex.A1 the right of ingress and egress to the property bearing S.No.76/7A which was sold as per Ex.A1 by him in favour of the plaintiff. In such a case, it cannot be stated that the plaintiff is having no right of easement by grant as per the deed Ex.A1 over the western portion of the defendants' property. Since in the sale deed itself unambiguously and unequivocally the common vendor set out the relevant facts that the plaintiff shall have the right of easement over the said property referred to supra, the question of prayer for declaration of title would not arise. Furthermore, the defendants have not disputed the versions in the said Ex.A1 and there was no counter claim also praying for declaring that the said incorporation of the version in Ex.A1 was against law or void etc. Hence, I am of the view that this suit cannot be treated as bad for want of prayer for declaration.

13. The question of prayer for mandatory injunction would not arise because no Tar road on any other road is contemplated. What is contemplated in Ex.A1, is only a right of ingress and egress to the plaintiff's property under Ex.A1 through the said cart track and nothing more is contemplated. In such a case the defendants should allow ingress and egress through that cart track to the plaintiff's land and nothing more is required. The question of ushering in the concept of mandatory injunction in my opinion is totally untenable. The first appellate Court giving importance to Ex.A1 and the genuineness of the averments found therein recorded its detailed finding reversing the finding of the trial Court which is obviously wrong. The trial Court even went to the extent of misconstruing as though the suit property is the property of the plaintiff. In stricto sensu

here, the disputed property, namely the suit property, is only the cart track which is situated to the western portion of the defendants' land and misconstruing as though the itteri, so to say the pathway situated to east of the defendants' land also was in the contemplation of the subject matter of the suit, the trial Court decided the lis. Once the parties in the cold light of the day agreed to have certain arrangements, then the Court has to enforce their contractual obligations if they are not illegal or perverse or void ab initio. There is no question of the Court incorporating its own view in rendering the judgment in a core based on the contractual rights and liabilities. The trial Court virtually was very much carried away by the fact that the itteri is admittedly situated to the east of the plaintiff and defendants' land and the first appellate Court being the last Court of fact after correctly appreciating the facts reversed the said finding warranting no interference in the Second Appeal.

21. In The Nurses Association (Reg). rep. by its Secretary Vs. Shree Vepery Swetambar Murthi Pujak Jain Singh and others reported in 2014 (2) MWN (Civil) 785, it has been held as follows :

"20. The documents, especially Ex.A2, contains a clear recital that only a right of passage through the driveway was given to the purchaser and the title to the land would vest to the vendor. However, it was provided without ambiguity that the title holder, namely the vendor under the Ex.A2 sale deed should use it only as a driveway and should not put up any obstruction or construction so as to hinder the use of the driveway. When vendor has chosen to impose a restriction corresponding to a right of passage granted to the purchaser on the use of his property, then the vendor cannot contend that the right of passage cannot be exercised over the entire breadth of 40 feet and that he can leave a space with a reasonable breadth so as to allow passage of vehicles and use the rest of the portion as he likes. Suppose the document is silent as to the width of the portion over which the right of passage has been granted and it simply recites a right of passage, such a contention of the appellant/first respondent may be tenable. The sale deed itself recites that the driveway of 40 feet over which the right of passage is granted. It has been proved not only by the documentary evidence but also by the oral evidence

and in addition by the admission of DW1. Hence, there cannot be any abridgment or restriction of the right of passage by narrowing down the passage from 40 feet to a lesser width without the consent and concurrence of the respondent herein/plaintiff, who has got the grant not gratuitously, but for a price. Even in the absence of the production of Ex.A7, the first respondent/plaintiff shall be entitled to the relief of permanent injunction in respect of the driveway that has been referred to in Ex.A2. The appellant/first defendant has not disputed that there was no cause of action for the first respondent/plaintiff to file the suit for injunction. Admittedly, an attempt was made to cause obstruction by putting up construction leaving only a lesser space as an access to the rear portion of the plaintiff's property and they had started laying a foundation. Therefore, the cause of action for the suit has also been proved.

21. Hence, this Court does not find any substance in the contention of the appellant that the rejection of the contention of the appellant regarding the admissibility of Ex.A7 was bad in law. Ex.A7 is a supporting document, which is also an original document signed by the Assistant Engineer. What evidentiary value can be attached in the light of its incorporation in the sale deed is a matter for appreciation. That will not affect the admissibility of Ex.A7. Therefore, the second substantial question of law relied on by the appellant/first defendant also deserves to be answered against the appellant and in favour of the first respondent/plaintiff."

From the above judgments and having regard to the specific recitals in the Ex.A.1 to Ex.A.3 and Ex.B.1 and Ex.B.2 with regard to the extent of car track and in the absence of the evidence and pleadings to show that the such grant has been extinguished due to non use, it is to be held that the plaintiff is certainly entitled to use the car track sale in his favour. Therefore, once, easementary right has been granted and specifically mentioned in the sale deed, and there is no evidence to show its extinguishment, the plaintiff has to necessarily succeed and the substantial questions of law are answered in favour of the plaintiff.

22. Accordingly, this Second Appeal is allowed and the judgment and decree of the Courts below are set aside and the suit is decree for declaration and consequential injunction.

Consequently, connected miscellaneous petitions are closed. No cost.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

vrc

To

1. The Subordinate Judge,
Harur.
2. The Sub Court, Dharmapuri.
3. The District Munsif,
Harur.
4. The Section Officer,
V.R Section,
High Court, Madras

+2cc to Mr.P.Valliappan, Advocate sr.40875

+1cc to Mr.R.Chandrasekaran, Advocate sr.41751

Judgment in
Second Appeal No.824 of 2011

rsi(co)
nr 13/12/2019

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