

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 03.07.2019

PRONOUNCED ON: 28.08.2019

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A.No.78 of 2016

and

C.M.P.No.1890 of 2016

1. Durairaj

2. Arokiyaraj

3. Mariammal

4. Priscilla Mary ... Appellants/Respondents/Defendants

Vs.

Philip ... Respondent/Appellant/Plaintiff

Prayer: Second Appeal filed under Section 100 of C.P.C., against the judgment and Decree dated 16.10.2015 made in A.S.No.36 of 2014 on the file of the Additional District Sessions Court cum Chief Judicial Magistrate Court, Ariyalur reversing the judgment and decree dated 30.08.2013 in O.S.No.46 of 2008 on the file of the District Munsif Court, Jayamkondam.

For Appellants : Mr.B.Ravi

For Respondent : Mr.P.Valliappan

J U D G M E N T

Challenge in this Second Appeal is made to the judgment and decree dated 16.10.2015 passed in A.S.No.36 of 2014 on the file of the Additional District Sessions Judge cum Chief Judicial Magistrate Court, Ariyalur, reversing the judgment and decree dated 30.08.2013 passed in O.S.No.46 of 2008 on the file of the District Munsif Court, Jayamkondam.

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

(a) Whether in law is not the Lower Appellate Court wrong in granting decree for declaration of Easementary

Right by prescription in violation of the mandatory provisions of Section 13 of Easements Act?

(b) Whether in Law is not the Lower Appellate Court wrong in granting decree for declaration of Easementary Right by prescription as prayed for by holding that the Appellant / Plaintiff is entitled for Easementary Right by necessity which is not prayed for?

(c) Is not the judgment of the Lower Appellate Court vitiated in that it has failed to consider Exs.B3 to B5 which clearly show that there is no reference to the existence of Cart Track in the prior title deeds?

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. For the sake of convenience, the parties are referred to as per the rankings in the trial court.

5. Suffice to state that the suit has been laid by the plaintiff seeking the reliefs of declaration and permanent injunction.

6. The relief of declaration sought for by the plaintiff is the easementary right which is stated to have been acquired by the plaintiff in respect of the suit cart track and according to the plaintiff, he had acquired the easementary right qua the suit property both by way of prescription as well as by way of necessity and thereby contended that the plaintiff and his predecessors in interest had been enjoying the suit cart track for more than the statutory period and also contended that other than the suit cart track, there is no other access to reach his properties and putting forth the case that the defendants without any entitlement, attempted to interfere with his right of easement over the suit cart track and thereby prevented him from enjoying his properties and hence according to the plaintiff, he has been necessitated to lay the suit against the defendants for appropriate reliefs.

7. The defendants resisted the plaintiff's suit contending that there is no cart track on the ground as alleged in the plaint and according to the defendants, they had purchased the extent of 30 cents of land by way of a sale deed dated 30.06.1998 inclusive of the portion alleged to have been used as the cart track by the plaintiff and his predecessors in interest and further according to the defendants, the suit cart track has never been in existence and never been in the possession and enjoyment of the plaintiff and his predecessors

in interest and therefore according to the defendants, the plaintiff is not entitled to seek and obtain the reliefs prayed for. Further according to the defendants, the plaintiff has other access to reach his properties and accordingly also disputed the case of the plaintiff's that he had right of easement over the alleged suit cart track by way of necessity and in toto prayed for the dismissal of the plaintiff's suit.

8. Based on the materials placed on record and the submissions made by the respective parties, the trial court was pleased to dismiss the plaintiff's suit. The first appellate court, however set aside the judgment and decree of the trial court and granted the reliefs in favour of the plaintiff as prayed for. Impugning the same, the defendants have come forward with the present second appeal.

9. The plaintiff is claiming the easmentary right in respect of the suit property which according to the plaintiff, is the cart track and the description of the suit property shown in the plaint depicts that the suit property is comprised in R.S.No.1/8 measuring east-west 40 ft and north-south 15 ft out of 0.86 cents shown red in colour in the plaint plan as RSID and it is further stated that the suit property is situated to the east of the land belonging to the plaintiff comprised in Survey No.1/1 and to the west of the land belonging to the plaintiff comprised in Survey No.1/8 and to the south of the first defendant's land and to the north of the land belonging to Chithra Stephen Sahaya Raj and the plaintiff.

10. Inasmuch as the defendants are in toto challenging the existence of the cart track in the suit property as alleged by the plaintiff and also disputing the alleged claim of easmentary right in respect of the same both by way of prescription and by way of necessity as claimed by the plaintiff and when according to the defendants, they had purchased the property inclusive of the suit property and that the plaintiff has never used the suit property as the cart track to have access to his lands, in such view of the matter, it is for the plaintiff to establish his case by placing acceptable and reliable materials.

11. To sustain his case, the plaintiff is found to have mainly relied upon the sale deeds marked as Exs.A1 to A3. On a perusal of Ex.A1, as rightly found by the Courts below, the plaintiff is found to have acquired the property shown as KBCL in the plaint plan from one Ambrose and Gnanamuthu and by way of Ex.A3 sale deed dated 19.01.2004, he is found to have acquired the property from Ambrose and Joseph shown as HJMI in the plaint plan and thereafter by way of the sale deed dated 28.01.2008 marked as Ex.A2, he is found to have acquired the

portion shown an JKLM in the plaint plan and according to the plaintiff, inasmuch as in the abovesaid three sale deeds, he has been granted the pathway right and cart track right in respect of the suit property, it is his case that he has the right of easement over the suit cart track both by way of prescription and by way of necessity. No doubt, there is a reference about the mamool pathway and cart track in the abovesaid sale deeds. However as rightly contended by the defendants other than the vague description of mamool parthway and the cart track, the abovesaid sale deeds do not depict the cart track portion as measuring east-west 40 ft and north-south 15 ft as described in the plaint. Furthermore, as rightly determined by the trial court, when the executants /vendors of Ex.A1 had described their trace of title to the property comprised therein as belonging to them ancestrally and by way of joint patta, they have not described therein that they had been enjoying the suit property as the cart track other than vaguely describing the same as mamool pathway. The vendors of Ex.A3 sale deed would claim that the property comprised therein had been acquired by them by way of a sale deed dated 03.12.1999 and the copy of the above said sale deed dated 03.12.1999 has come to be marked by the defendants as Ex.B4. If really as putforth by the plaintiff, the vendors of Ex.A3 and their predecessors in interest had been enjoying the suit property as the cart track for gaining access to their respective lands, necessary recitals to that effect would have been incorporated in the title deed dated 03.12.1999 marked as Ex.B4. However, as rightly determined by the trial court, absolutely there is no reference to any cart track in Ex.B4 sale deed and therefore when the vendors of Ex.A3 sale deed had not acquired any right over the alleged suit cart track i.e., the suit property by way of Ex.B4 sale deed, as rightly held by the trial court, they would be incompetent to alienate any cart track right over the suit property to the plaintiff by way of Ex.A3 sale deed. Similarly the vendors of Ex.A2 sale deed is found to have acquired the properties comprised therein by way of the sale deeds dated 05.04.2005 and 22.03.2004 and the abovesaid sale deeds had come to be marked by the defendants as Exs.B3 and B5 and if really, the vendors of Ex.A3, had acquired the right and been enjoying the suit cart track, necessary recitals would have been incorporated in Ex.B3 and B5 sale deeds with reference to the same. However as rightly found by the trial court and contended by the defendants' counsel, Exs.B3 and B5 do not disclose any reference to any pathway or cart track. In the light of the abovesaid position, when the earlier title deeds projected in the matter marked as Exs.B3 to B5 do not disclose the existence of any cart track over the suit property, in such view of the matter, merely because some reference about the mamool cart track/ pathway had been mentioned in the sale deeds marked as Exs.A1 to A3 executed in favour of the plaintiff, on that score, it is seen that, as

determined by the trial court, the plaintiff would not be entitled claim any right of cart track over the portion / land belonging to the defendants. The abovesaid facts have been failed to be considered by the first appellate court and therefore the reasonings and conclusions of the first appellate court without advertting to the same one way or the other and ignoring the same and thereby granting the reliefs in favour of the plaintiff are found to be totally unjustified and could only be termed as perverse, illogical and irrational. As abovenoted, there is no indication contained in Ex.A1 sale deed that the executants of Ex.A1 had been enjoying the cart track in the defendants' property as sought to be made out by the plaintiff.

12. As could be seen from the materials placed on record, it is found that the plaintiff had issued the legal notice dated 28.03.2007 to the defendants' vendor Anothoniyammal, the plaintiff's vendors Michael and Ambrose and by way of the said legal notice, the plaintiff had directed them not to interfere with his alleged claim of possession and enjoyment of the suit cart track and also called upon them to acknowledge the suit cart track and also called upon them to acknowledge the plaintiff's right of easement over the suit cart track within three days from the date of receipt of the said notice. Only subsequent thereto, it is found that the plaintiff had acquired the sale deed Ex.A2 from Michael. The plaintiff's vendor Michael had repudiated the claim of easementary right claimed by the plaintiff in respect of the alleged suit cart track by sending a reply to Ex.A5 notice and the reply notice sent by Michael dated 25.04.2007 marked as Ex.A7. Similarly, the defendants' vendor Anthoniyammal had sent a reply dated 11.04.2007 marked as Ex.A6. By way of Ex.A7, the plaintiff's vendor Michael had disputed the claim of plaintiff's alleged right over the suit cart track and in such view of the matter, the present case now projected by the plaintiff that the same Michael had conveyed the suit cart track right in his favour by way of Ex.A2 sale deed cannot at all be believed and accepted. Therefore, when the plaintiff's vendor Michael had challenged the claim of cart track right claimed by the plaintiff over the suit property by way of Ex.A7 to say that he had conveyed the alleged cart track right in favour of the plaintiff by way of Ex.A2 sale deed cannot at all be believed and accepted in any manner and despite the abovesaid unsustainability in the case of the plaintiff, still the plaintiff had not endeavored to examine his vendor Michael or his other vendors to establish that they and their predecessors in interest had been exercising any such cart track right over the suit property as sought to be projected by the plaintiff. By way of Ex.A6 reply notice, the defendants' vendor had challenged the claim of the plaintiff's alleged right over the suit cart track.

13. The plaintiff has put forth the case that the properties acquired by him and other properties adjacent thereto had been originally enjoyed by Sebasthy Udaiyar and his sons and the materials placed on record go to show that the Sebasthy Udaiyar had acquired the properties in question by way of a sale deed dated 04.06.1982 and the copy of the abovesaid sale deed has come to be marked as Ex.B9. On a perusal of Ex.B9, it is found that there is no reference at all contained therein depicting any pathway or cart track right over the suit property and therefore the claim of the plaintiff that his predecessors in interest had been using the suit cart track for gaining access to their other lands in and around the same cannot at all be believed and accepted. In such view of the matter, the further contention of the plaintiff's counsel that the plaintiff's vendors and their predecessors in interest being close relatives, on that score they had not endeavored to describe the pathway / cart track right over the suit property in the earlier deeds and that the said factor cannot be projected against the plaintiff. However, as rightly held by the trial court, when the common owner endeavor to divide or dispose of the properties amongst his sons/ others, naturally he and the sharers would tend to describe the pathway/ cart track, well portion enjoyed by them in common, so as to avoid disputes amongst the different sharers. On the other hand, when as above pointed out, the earlier title deeds of the plaintiff's vendors marked as Exs.B3, B4 and B5 and the earliest title deed Ex.B9 also do not indicate or depict any pathway or cart track right over the suit property in any manner and when for the first time, such a right had been conveyed to the plaintiff by way of Exs.A1 to A3 sale deeds, in such view of the matter, when as abovenoted, the plaintiff has miserably failed to establish that his predecessors in interest had been enjoying any pathway / cart track right over the suit property as described in the plaint, the inevitable conclusion that could be arrived at is that, as determined by the trial court, the plaintiff has miserably failed to establish that the suit cart track is in existence on ground and that the same has been in the possession and enjoyment of the plaintiff and his predecessors in interest beyond the statutory period and in the light of the above position, it is seen that the trial court is wholly justified in holding that the plaintiff has miserably failed to establish his alleged claim of eastmentary right over the suit property and considering the above factors, in my considered opinion, no interference is called for with reference to the abovesaid determination of the trial court. The first appellate court has miserably failed to consider the abovesaid aspects by assessing and analyzing the materials placed on record in the right perspective and on the other hand blindly has proceeded to hold that the plaintiff has established his eastmentary right over the suit cart track by way of prescription despite the dearth of

acceptable proof pointing to the same on the part of the plaintiff.

14. Furthermore, as could be seen from the materials placed on record, particularly, the Commissioner's report and plan marked in the case as Exs.C1 to C3 in toto and when the Commissioner in his report has clearly found that there is no trace of any cart track in the suit property and on the other hand, there are trees and only a fence in and around the same and further from the features noted by the Advocate Commissioner only an endeavor has been made to create the pathway/cart track in the suit property as pointed out by the Advocate Commissioner, in such view of the matter, the Commissioner's report and plan also, in my considered opinion, as determined by the trial court, do not advance the plaintiff's case in any manner to show the existence of any cart track over the suit property or pathway over the suit property particularly, for the enjoyment of the plaintiff for gaining access to his lands and in such view of the matter, the first appellate court without analyzing the materials placed on record in toto by erroneously analysing the Commissioner's report and plan has proceeded perversely in holding that the plaintiff has established his right of easement over the suit cart track as putforth in the plaint.

15. As regards the claim of easementary right by way of necessity, when as could be seen from the Commissioner's report and plan, the plaintiff is having access to reach his lands and the same could also be gathered from the evidence of P.W.2 examined on behalf of the plaintiff and in such view of the matter, the plaintiff's claim of easementary right over the alleged suit cart track by way of necessity also falls down and when as above noted the plaintiff has miserably failed to establish that the suit cart track has been in existence and in the enjoyment of his predecessors and himself for more than the statutory period and the plaintiff having miserably failed to establish that there is no other access to reach his lands and on the other hand, when as above pointed out, the plaintiff is having other access to reach his lands, in such view of the matter, in toto, the plaintiff is found to be not entitled to seek any right over the suit property claiming the same as pathway or cart track and that he has been enjoying the same by way of easement, both by prescription and necessity.

16. In the light of the abovesaid discussions, the first appellate court is found to have granted the reliefs in favour of the plaintiff without considering the materials placed on record in the right perspective, particularly ignoring the title deeds of the plaintiff's vendors marked as Exs.B3 to B5 and failed to consider that the plaintiff

has miserably not established the usage of the alleged suit cart track by him and his predecessors in interest beyond the statutory period as prescribed under section 15 of the Easements Act and failed to appreciate that the plaintiff is having other access to reach his lands as could be gathered from the Commissioner's report and plan and the evidence of P.W.2 and other materials. In such view of the matter, the reasonings and conclusions of the first appellate court for upholding the plaintiff's case being found to be based upon the erroneous appreciation of the materials placed on record as well as the deliberate avoidness of the materials placed on record, particularly, projected on the part of the defendants and also not in accordance with the principles of law governing the issues involved between the parties, in such view of the matter, the same could only be termed as totally perverse, illogical and irrational and in such view of the matter, the judgment and decree of the first appellate court upholding the plaintiff's case cannot be sustained in the eyes of law and liable to be set aside. The substantial questions of law formulated in the second appeal are accordingly answered against the plaintiff and in favour of the defendants.

17. In support of his various contentions, the plaintiff's counsel placed reliance upon the decision of this Court dated 26.04.2019 passed in S.A.No.824 of 2011[D. Jeyabal Vs. S.Chitra and others] and the decisions reported in

1. 2019 (2) CTC 745 [Jasmine Ennasi Vs. Thaiyalnayagi Ammal and others]
2. 2019 (2) CTC 397 [Koolan @ Munsamy Vs. Chennammal]

Similarly in support of his contentions, the defendants' counsel placed reliance upon the decisions reported in

1. AIR 1986 Karnataka 256 [T. Ranganna (deceased by LRs) Vs. Bhagirathi Bai and another]
2. 2008 (17) SCC 491 [Bachhaj Nahar Vs. Nilima Mandal and another]
3. Vol.XXVII ILJ 495 [Krishnamarazu Vs. Marraju]

The principles of law outlined in the abovesaid decisions are taken into consideration and followed as applicable to the case at hand.

18. For the reasons aforesaid, the judgment and decree dated 16.10.2015 passed in A.S.No.36 of 2014 on the file of the Additional District Sessions Judge cum Chief Judicial Magistrate Court, Ariyalur, are set aside and the judgment and decree dated 30.08.2013 passed in O.S.No.46 of 2008 on the file of the District Munsif Court, Jayamkondam are confirmed.

Accordingly, the Second Appeal is allowed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-

Assistant Registrar (CS-VIII)

//True Copy//

Sub Assistant Registrar

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To

1.The Additional District Sessions Judge cum
Chief Judicial Magistrate,
Ariyalur .

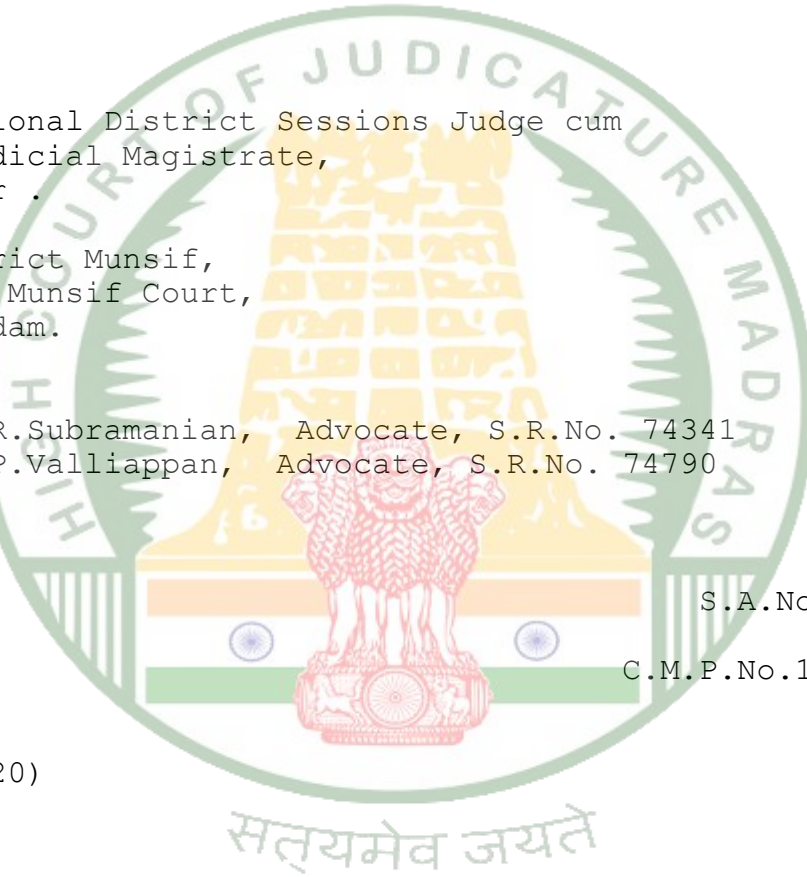
2.The District Munsif,
District Munsif Court,
Jayamkondam.

+1cc to Mr.R.Subramanian, Advocate, S.R.No. 74341

+2cc to Mr.P.Valliappan, Advocate, S.R.No. 74790

S.A.No.78 of 2016
and
C.M.P.No.1890 of 2016

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