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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 25.01.2021
PRONOUNDED ON : 01.04.2021

CORAM

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

S.A.No.1315 of 1997
and C.M.P.No.12879 of 1997

- 1.Ramasamy Gounder (Deceased)
- 2.Ratnam
- 3.Thangamani
- 4.Kalaiselvi
- 5.Yuvaraj (minor)
- 6.Janaki
- 7.Sampooranam

...Appellants

Name of the fifth appellant included vide order of Court dated 28.04.2014 in CMP.No.855 of 2011 in S.A.No.1315 of 1997

4th Appellant declared as Major and third appellant discharged from her guardianship vide order of this Court dated 16.08.2011 made in CMP.No.177 of 2011 in S.A.No.1315 of 1997

Appellants 6 & 7 brought on record LRs of the deceased first appellant vide order of Court dated 17.02.2011, made in CMP.No.1219 of 2010

Vs.

- 1.Muthukumar
- 2.Pechiammal
- 3.Minor Venkatachalam
S/o.Karuppanna Gounder,
represented by his mother Pechiammal
- 4.Ammaniammal
- 5.R.Muthusamy
- 6.Saraswathy
- 7.K.Balasubramani
- 8.Rajeswari @ Mallika (Died)
W/o.Avinasikutty
Gounder & Co.,
Palladam Road,
Tiruppur, Coimbatore District.
9. Avinashi Kutti
- 10.Priya
- 11.Karthi

...Respondents



RR9 to 11 brought on record as legal representatives of the deceased R8 vide order of Court dated 21.06.2019 made in CMP.No.10932 to 10934 of 2016 in S.A.No.1315/1997.

PRAYER: This Second Appeal has been filed under Section 100 of CPC., against the decree and judgment dated 31.03.1997 made in A.S.No.69 of 1996, on the file of the Court of the learned First Additional District Judge-cum-Chief Judicial Magistrate, Erode, confirming the decree and judgment dated 05.01.1996, made in O.S.No.1399 of 1992, on the file of the Court of Principal District Munsif, Erode.

For Appellants: Mr.R.Singaravelan
Senior Counsel
for Ms.M.Srividhya
For R1, R2, R3: No appearance
For R4, R8 : Died
For R5 : Mr.A.Sundaravadhanan
For R6, R7,
R9 to R11 : Not ready in Notice

JUDGMENT

The defeated defendants are the appellant herein.

2.The respondents herein/plaintiffs have filed a suit in O.S.No.1399 of 1992 before the District Munsif Court, Erode, to declare that they are the absolute owners of the suit property and the defendants have right to use the suit pathway only as a foot path and for permanent injunction against the defendants from driving carts etc., in the suit property and not to interfere with the suit property. The suit was decreed. Aggrieved against the same, the appellants herein have filed an appeal in A.S.No.69 of 1996 before the First Additional District Court, Erode and the same was dismissed. Hence, the Second Appeal.

3.The above Second Appeal was admitted on the following substantial questions of law:

1.Whether the findings of the Courts below regarding patta granted in respect of R.S.No.411/4 in old Survey No. 326 are correct?

2.Whether the Courts below are correct in accepting the case of the respondents/plaintiffs inspite of respondents/plaintiffs failure to prove their easementary right?

4.Heard Mr.R.Singaravelan, learned Senior Counsel for the appellants and Mr.A.Sundaravadhanan for the fifth respondent and others are not necessary parties. Perused the materials placed on record.



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5. Before the Trial Court, during the course of Trial on behalf of the plaintiffs PW1 was examined and marked Exs.A1 to A13 and on behalf of the defendants, DW1 & DW2 were examined and marked Exs.B1 to B10.

6. After hearing Mr.R.Singaravelan, learned senior advocate appearing for the appellants, this Court finds that the substantial question of law No.2 has to be re-framed as under:

"Whether the Courts below are correct in accepting the case of the respondent/plaintiff in spite of the appellant/defendant had proved the easementary right by prescription."

7(a). It reveals from the records that the respondents herein have filed a suit in O.S.No.1399 of 1992, on the file of the Court of District Munsif, Erode, to declare that they are the absolute owners of the suit property, which situated in S.F.N.326 (R.S.No.4114) Kulavilaku Village Erode District, subject to the petitioners herein/defendants right to use the same as a foot path and for permanent injunction restraining the petitioners herein/defendants from driving carts etc., in the suit property or interfering in any manner with their uses of the suit property.

7(b). The first defendant in the said suit has filed a written statement by contending that from time immemorial, the persons who executed the sale deed dated 20.09.1946, which is marked as Ex.A3, are using the suit property as a cart track and for grazing cattle without any interference and they acquired easementary rights. Moreover, patta has also been granted in favour of Karuppayee Ammal in R.S.No.114/4 and hence it is not open to the respondents herein/plaintiffs to contend otherwise and hence, the Second Appeal.

8. The sum and substance of the lis between the parties is whether the suit property is to be used as "pathway or cart track"?

9. According to the respondents herein/plaintiffs, the suit property is the property owned by the ancestor and predecessor in the title of the plaintiffs/respondents herein and they were permitted to be used by the predecessor in title of the appellants herein/defendants and relied upon recital in Ex.A3/sale deed executed in favour of Karuppayee Ammal.

10. Per contra, the case of the appellants herein/defendants as projected by their learned senior counsel Mr.R.Singaravelan, is that both the Courts below have miserably failed to consider Exs.A11 & A12, that are the final decree proceedings passed in O.S.No.341 of 1949 between the brothers of the predecessors in



title, wherein, the suit property was mentioned as cart track and also invited my attention to Ex.A13/Advocate Commissioner report and plan, which was filed in O.S.No.341 of 1949, by the Advocate Commissioner before the concerned Court on 14.06.1954.

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11.Admittedly, the sale deed executed in favour of Ramasamy Gounder, Sivagamiammal & Saradammal was under Ex.A2, which is dated 01.06.1983, assumes significance. The relationship between the parties as mentioned before the Lower Appellate Court are not in dispute. The respondents herein/plaintiffs relied upon Ex.A1/sale deed executed by Nallasamy Gounder in favour of Karuppayee Ammal, dated 19.05.1948 and Ex.A2/sale deed dated 01.06.1983.

12.It remains to be stated that Karuppayee Ammal, who is the mother of the defendants 1 & 2, had purchased the property from Palaniappa Gounder and the same was marked as Ex.A3, dated 20.09.1946. The re-settlement register and Patta was granted to the said Karuppayee Ammal in respect of the suit property viz., strip of the land, is under Ex.A5, dated 26.03.1992.

13.Further the learned Senior Advocate appearing for the appellants would also rely upon Ex.B1 to show the plaint in O.S.No.1066 of 1990 to substantiate that the subject matter of the suit property viz., schedule of the property is "Cart Track not Pathway".

14.From the decree in O.S.No.1399 of 1992, this Court finds that the suit property is situated in Erode Taluk, Kulavilakku Village, old S.F.No.326 pubja acres 5-96 in this the strip of land washed in red colour ink the plaint plan ad-measuring 12 feet in East - West and 300 feet in North - South situate within the following boundaries:

North of East-West road, West of the land of Subban and others (now owned by Palanisamy and Subramaniam)

South of the land of the defendants and East of the land of the plaintiffs.

R.S.No. for the same is 411/4 and hence, boundaries are not in dispute. As per Ex.A5, the Old Survey.No.326, New Survey No.411/4 stands in the name of the Karuppayee Ammal, shown as a foot path.

15.Both the Courts below have concurrently held that in view of the recital in Ex.A3/sale deed dated 20.09.1946, showing the suit property as foot path, has granted the decree in favour of the plaintiffs that the plaintiffs are entitle for declaration of the title over the suit property viz., the strip of the land measuring 12 feet x 300 feet subject to easementary right of the defendants to use it as foot path and not as a cart track and



granted a permanent injunction against the defendants from using it as cart track.

16.The core issue that has to be determined in this Second Appeal is that as to whether the subject matter of schedule of the property is pathway as contended by the plaintiffs or cart track as projected by the defendants and if so, whether the defendants/appellants herein has prescribed by long usage of the same as cart track easement by prescription.

17.The sale deeds in respect of respective parties are not in dispute; relationship between the parties are not in dispute; common owner of the both the properties are not in dispute; Ex.A11, A12 & A13 and B1 are relating to the suit property and the neighbouring lands are not in dispute.

18.Admittedly, there is a recital in Ex.A3/sale deed dated 20.09.1946 executed in favour of Karuppayee Ammal, wherein it is mentioned as foot path and the Patta for the suit property as granted in Ex.A5 also stands in the name of the Karuppayee Ammal, who is the mother of the first & second defendants. On the date of the evidence, Karuppayee Ammal died 40 years before. No doubt, it is true that Ex.A5 is the Patta and the same not the evidence of title, however, it is an evidence of possession and it goes to show that the said Karuppayee Ammal was in possession of the suit property for more than 40 years.

19.Further, in view of the evidence of DW1, it is seen that except suit property, there is no other way to reach his property or in the alternate that, suit property - cart track is necessity to reach his land.

20.On the contrary, the respondents herein/plaintiffs have an alternative route annexing the high way road, so is the evidence of the DW1 and DW2. The answer is illustrated from the cross-examination of the PW1 that he has another route to reach his property. However, denied the non existence of any other alternative route to the defendants land. The evidence of DW2/Palanisamy in respect of nature of use of the suit property that even Karuppayee Ammal during the life time had used to take the cart track cannot be discarded without any valid reasons. A snap answer in the cross-examination cannot be allowed to discredit the other ways valid deposition of DW2/Palanisamy.

21.On a combine reading of the chief and cross-examination of DW2/Palanisamy, I find that evidence of the DW2, a very old man of the village can not be discredited in a summary manner as done by the Lower Appellate Court. The oral evidence of DW2 is to the effect that Karuppayee Ammal for the time immemorial more than 50 years from the date of purchase (under Ex.A3) was using



the land as cart track to reach her land. Further more there is no other alternative cart track to reach the land, which also assumes significance.

22. In this regard, I like to refer to the Advocate Commissioner Report filed in O.S.No.341 of 1949 before the District Munsif Court, Erode, which is annexed to the final decree proceedings passed between the predecessors in title of the plaintiffs. Admittedly, the plaintiffs have drive the title from the one of the party to the final decree proceedings in O.S.No.341 of 1949 and the final decree is marked as Ex.A2. The Advocate Commissioner report filed in that final decree proceedings along with map is marked as Ex.A13, dated 14.06.1954. In other words that is much before the sale in favour of the plaintiffs under Ex.A2 dated 01.06.1983.

23. It remains to be stated that both in the Advocate Commissioner report and in the sketch the suit property is described as "Cart route and Cart Track" and hence I find that even in the year 1954 as per Exs.A11 and A13, the suit property is described as Cart Track, if at all it can be presumed that by omission or error or mistake appears to have been crept in the words recorded in Ex.A3. Merely because recital is there in Ex.A3, the same cannot be read in isolation. As per Exs.A11, A12 & A13, wherein it is specifically mentioned that the suit property is 5 metres = 16 feet.

24. It is a specific case of the respondents herein/plaintiffs that initially there was a path way and subsequently they have widen pathway to use cart track. For the reasons best known, he has not mentioned when such extension has taken place or broadening of the pathway has taken place. Even before the purchase of the property by the father of the plaintiffs, the suit property was mentioned as a cart Track measured 16 feet in East - West and 300 feet in North - South as could be seen from Exs.A12 and A13. Hence, the plea raised by the plaintiffs, as if, after purchase of the property under Ex.A2 only, the father of the plaintiffs has broaden the road, this Court finds that the suit property under the survey number 411/4, stands in the name of Karuppayee Ammal, the mother of the first and second defendants, she had purchased the property under Ex.A3.

25. As per the Court document under Exs.A12 and A13, even in the year, 1954, the suit property is described as cart track and cart route, so also in the plaint filed by the plaintiffs in O.S.No.1066 of 1990 before the District Munsif Court, Erode, the same is mentioned a cart track only, which assumes significance.



26.Thus, I find that the revenue record under Ex.A5, though not be the evidence of title, however be evidence of possession to the limited extent thereto, as indicated above, even in the year 1954 width of the suit property is 15 feet. Even as per Ex.B1, the suit property was referred to the other part of the suit property, continuity piece of land of the suit property is mentioned as cart track of the five meter breadth also lends support to the Ex.A12 and A13 as discussed supra and thus, I find that even before the purchase of the property by the respondents herein/plaintiffs in entirety along with the suit property under Ex.A12, the width of the road is 15 feet.

27.Hence, I find that Karuppayee Ammal using the said pathway as cart track measuring an extent of 16 feet in East West and 300 feet in North - South right from 1954. Even from the year 1954, as could be seen from Exs.A12 to A14, coupled with Ex.B1, her possession has been recognized by the Government and issued the patta and the chitta, resettlement register as could be seen from Ex.A5. Thus, I find that both the courts below have failed to appreciate the evidence of DW2 in proper prospective.

28.On a reading of the evidence of DW2 coupled with Ex.A5, clearly shows that it is a cart track. Under Ex.A13/Report of the Advocate Commissioner and the plaint filed in above said final decree proceedings in O.S.No.341 of 1949, which goes to show that the said suit property measuring 15 feet was not given any right to any person individually and was allotted to be used in common and hence, I find that the appellants herein/defendants had prescribed a right of easement to use the suit property as cart track, as could be seen from the final decree proceedings filed under Exs.A12 and A13.

29.It is need less to say that PW1 in the cross-examination has admitted that appellants herein/defendant are having easementary right of pathway in old survey number, measuring 12 feet.

30.On the contrary, from the documentary evidence as discussed above, the appellants herein/defendants have successfully demonstrated that the suit property is only a cart track and that is the only way available to the appellants herein/defendants to take cart and cattle to their land. The said land was used by the mother of the defendants 1 & 2 viz., Karuppayee Ammal, was duly spoken to by Village old man/DW2, whose evidence, on a close scanning and scrutiny found to be reliable.



31. Accordingly, in view of the admission of PW1 in the cross-examination about the use of the land by the appellants herein/defendants coupled with the evidence of DW1 about the usage of land by the appellants herein/defendants and her mother for more than 50 years and also, an extent of 15 feet land as could be seen from Exs.A12 & A13 as cart track, this Court finds that the defendants have successfully proved their pleadings as to the usage of the suit property in a larger extent as found out in Exs.A12 to A13, as cart rack and they prescribed easement by prescription, by using the land for more than 40 years on the date of filing of the suit before the Trial Court. In the absence of any positive evidence that no other cart track is available for the defendants to take the cart and cattle to their agricultural land, it also goes to show that it is an easement of necessity and hence, I find that the both the Courts below have concurrently erred in holding otherwise.

32. Hence, I find that the finding rendered by both the Courts below regarding Patta granted in R.S.No.411/4 relating to the old No.326 is not correct in toto, though it is not an evidence of title, it goes to show that it is an evidence of possession about the usage of the land as easement of necessity and both the Courts below are erred in accepting the case of the respondents herein/plaintiffs in spite of the defendants/appellants herein, proving its easementary right.

33. Accordingly, both the substantial questions of law are answered in affirmative in favor of the appellants herein/defendants and against the respondents herein/plaintiffs.

34. In the result, the Second Appeal stands allowed and the judgment and decree passed by the Trial Court in O.S.No.1399 of 1992, dated 05.01.1996 and confirmed by the Lower Appellate Court in A.S.No.69 of 1996, dated 31.03.1997, shall stands modified to the limited extent that the plaintiffs are declared as a owner of the suit property subject to the condition that, the appellants herein/defendants are entitled to use the suit property as cart track subject to the above easementary right, the title of the plaintiffs is declared as stated supra. No costs. Consequently, connected miscellaneous petition is closed.

s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar



dua
To

1.The First Additional District Judge-cum-Chief Judicial
Magistrate,
Erode.

2.The Principal District Munsif, Erode.

+1 Cc to M/s.V. Ambika, Advocate sr 21563.

S.A.No.1315 of 1997
and C.M.P.No.12879 of 1997

KJ(CO)
SP(29/10/2021)