



S.A. No. 1092 of 2013

WEB COPY IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 08.09.2022

Coram :

THE HONOURABLE MRS. JUSTICE T.V.THAMILSELVI

Second Appeal No. 1092 of 2013
and
CMP Nos.1 and 2 of 2013

1. K.Sivasamy
2. K.Kalimuthu ... Appellants

Versus

1. Kamalaveni
2. P.K.Palanisamy ... Defendants

This Appeal is filed under Section 100 CPC against the judgment and decree dated 02.08.2013 made in A.S.No.22 of 2011 on the file of learned Principal Subordinate Court, Coimbatore, confirming the judgment and decree dated 10.02.2011 in O.S.No.2029 of 2006 on the file of learned II Additional District Munsif Court, Coimbatore.



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For Appellants : Mr.T.Murugamanickam
senior counsel
for
M/s.Sarvabhauman Associates

For Defendants : Mr.S.Parthasarathy
Senior Counsel
for
M/s.K.A.Vimalkumar

JUDGMENT

This Appeal is filed against the judgment and decree dated 02.08.2013 made in A.S.No.22 of 2011 on the file of learned Principal Subordinate Judge, Coimbatore, confirming the judgment and decree dated 10.02.2011 made in O.S.No.2029 of 2006 on the file of learned II Additional District Munsif, Coimbatore.

2. Appellants herein are the plaintiffs in O.S.No.2029 of 2006 on the file of learned District Munsif Court, Coimbatore filed against the respondents herein/defendants for the relief of declaration in respect of 'B' schedule suit cart track that it is the only mode of access available to their property described as 'A' schedule property in the plaint and prayed for injunction relief not to cause any obstruction in the 'B' schedule suit cart



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track.

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3. Defendants contested the case, submitted that the 'B' schedule suit cart track is part and parcel of the lands belonging to them and except the defendants, no one can have any kind of right or claim over the 'B' schedule cart track. They also contended that the plaintiffs had not used the 'B' schedule cart track to reach their lands in 'A' schedule for the past several years as stated in the plaint.

4. Before the trial Court, three issues were framed, Commissioner was also appointed, visited the property and submitted the report and on hearing both sides, oral and documentary evidence were adduced, and on considering the descriptions found in the sale deeds adduced on the side of both the parties, viz., Exs.A1, A2 and B1, the trial Judge concluded that 'B' schedule cart track belongs to the defendants, in which the plaintiffs nor their predecessors have no right and title and also assumed that based upon Ex.B10-sale deed in the year of 2009, the plaintiffs have another access to reach their lands. Accordingly, the suit was dismissed.



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5. Aggrieved over, the plaintiffs preferred appeal before the Sub Court, Coimbatore in A.S.No.22 of 2011, wherein the lower appellate Judge, independently analysed the facts and evidence on record, held that the present suit 'B' schedule cart track is the newly formed private cart track of the defendants and the plaintiffs had not raised any objections at the time of obliterating the old common cart track and hence, seeking access through old cart track is not in proper, thereby the plaintiffs are not entitled to claim right over the 'B' schedule suit cart track, consequently the appeal was dismissed by confirming the findings of the trial Court.

6. Challenging the concurrent findings of the courts below, the plaintiffs preferred this appeal submitting that both the courts below failed to appreciate the mentioning of the cart track in the sale deeds Exs.A1, A2, A11 to A14, Exs.B6 to B8 as well as the Commissioner's report, which shows the existence of 'B' schedule cart track, but overlooking those documents, by relying the stray oral evidence, declined to grant relief as such is perverse and unjust and the same is liable to be set aside. Accordingly, the appeal was



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admitted on the following question of law:-

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(a) *Whether the Courts below are correct in law in overlooking the recitals in the documentary evidence in the form of Exs.A1, A2, A11 to A14, Exs.B6 to B8 overlooking Sec.59 of Indian Evidence Act ?*

(b) *Whether the Courts below are correct in law in failing to declare the 'B' schedule property as the only access to the 'A' schedule property especially in the light of the evidence of the Advocate Commissioner and the evidence available on record ?*

(c) *Whether the Courts below are correct in law in non suiting the appellants overlooking the easementary rights of the appellants ?*

7. Brief facts of the case is as follows:-

Plaintiffs purchased items 1 & 2 of 'A' schedule suit property in S.Nos.170 and 171/1 from one S.Arunachalam and Perumalsamy in the year of 2003 and 1994 respectively and their right over 'A' schedule property is



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not disputed by the defendants. The plaintiffs claiming that the only access to reach their land in 'A' schedule property is through 'B' schedule cart track with the breadth of 15 feet in S.No.196 running southwards through S.Nos.188, 186, 184, 185 and 181 of the defendants land till the land in S.No.171. As the defendants are owning agricultural land on either side and the 'B' schedule suit cart track is a mamool cart track from time immemorial and the same is used for all ingress and egress to take manure and all things that are necessary to cultivate the suit 'A' schedule property, the defendants attempting to obstruct the only mode of access available to the 'A' schedule property. Hence the suit.

8. Defendants admitted the existence of 'B' schedule suit cart track. But claimed that it is exclusive pathway/private pathway belongs to their lands, in which the plaintiffs have no right of access and by way of recent purchase in the year of 2009, the plaintiffs had alternative access to reach their land, as the plaintiffs approached the Court claiming declaratory relief over the 'B' schedule suit cart track, they bound to prove that the said cart track was enjoyed by their predecessors in title and subsequently, it is under



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their enjoyment.

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9. Learned counsel for the appellants submits that before the trial Court, sale deeds belong to the plaintiffs as well as the defendants and their predecessors in title were produced and marked as Exs.A1, A2, A11 to A14, Exs.B6 to B8, but both the Courts below failed to appreciate the mentioning of the cart track as mamool cart track and erroneously held that the plaintiffs are not entitled to use the suit cart track for the reason that there was no mentioning about the existence of the cart track in earliest 1958 document marked as Ex.B1 relates to common owner Kembakkal, subsequently, a pathway was mentioned in the document would not confer any title to the plaintiffs. Moreover, the said pathway belongs to the defendants, in which the plaintiffs are not entitled to claim right to have access. But the learned counsel for the appellants submits that originally the S.Nos.170,171/1, 226/1 and 227/1, a total extent of acre 14.5 cents of land, belong to one Kembakkal and as per the settlement deed Ex.B1 in the year of 1958, she settled the property in favour of her three grandsons – Raju, Jayaram and Perumalsami. Since the said entire property belongs to one owner-Kembakkal, there was



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no necessity to form a pathway. Hence in Ex.B1 settlement deed, there is no mentioning of mamool pathway. After the said settlement, her grandsons sold the property to third parties in the year of 1984 onwards through the sale deeds Ex.B2, B4, A8 and A2. All these documents are related to the year of 1984 and 1994. While selling the properties with the specific extent in the year of 1984 itself, to reach the lands in S.Nos.170 and 171/1, there is mentioning of 13 feet wide customary cart track (mamool) in the property description as rightly pointed out by the appellants/plaintiffs counsel. So the first plaintiff purchased item-1 of 'A' schedule suit property from his vendor Arunachalam in the year of 2003 and the second plaintiff purchased item-2 of 'A' schedule suit property in the year of 1994 from the grandsons of Kembakkal and those documents are marked as Exs.A1 and A2. As discussed above, in Ex.A2 relates to the year of 1994, there is a clear mentioning of 13 feet wide pathway and in Ex.A1 deed also, the right of customary cart track is mentioned. So the plaintiffs able to establish that for their lands in S.Nos.170 and 171/1, they were given access to use the 13 feet cart track, which is also mentioned as customary cart track in the documents relating to their predecessors in title.



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WEB COPY 10. The lands in S.F.Nos.180, 182/2, 184, 185, 186, 187/1 and 188

originally belong to one Nainna Gounder family and he had four daughters and there was a suit in their family in O.S.No.273 of 1955 and the four daughters got those lands and settled in favour of their legal heirs through the Will and the sale deeds, and there was oral exchange between the parties and those documents are mentioned as Exs.B6, B7, B8, A11 and A14 and it is an admitted fact on the side of the defendants. In the earliest document, in the year of 1963, marked as Ex.A14-sale deed for the lands in S.No.185, there is mentioning of the cart track existed in S.Nos.185, 186 and 188 on the eastern side of the fence, through which they are entitled to reach their land. The contention of the plaintiffs is that the said cart track is a mamool cart track for both the plaintiffs purchasers and the defendants purchasers. Though the defendants denied that the plaintiffs have no right, but they are unable to show the alternate pathway available for the plaintiffs and their predecessors in title to reach their lands in S.Nos.170 and 171/1. Even in the sale deeds relating to the defendants, viz., B6, B7 and B8 related in the year of 1984, 1986 and 1990, there is mentioning of mamool cart track to reach



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their lands. As per Ex.B6 sale deed of the year 1984, it is pertaining to the property, which was covered under the Will of the year 1974. In that sale deed, there is clear mentioning of mamool cart track. Hence, as claimed by the plaintiffs, both of their predecessors in title as well as the defendants predecessors in title used the 13 feet customary (mamool) cart track and it was the only cart track to reach their lands to take their cart and manure for several decades. The documents, as discussed above, clearly indicate the existence of 13 feet mamool cart track running from S.No.171 of the northern end and proceeding southwards till the lands of the plaintiffs through the defendants' lands. Hence, to reach 'A' schedule property, the plaintiffs have access through 'B' schedule cart track.

11. The Commissioner's report also reveals that through 'B' schedule property, he reached the 'A' schedule property at the time of his visit. Though the defendants claimed that the plaintiffs are having alternate access, but they have not shown to the Commissioner at the time of his visit. The defendants able to convince the Court that through Ex.A9 sale deed, first plaintiff purchased, in the year of 2009, a portion of the land in S.No.179/2



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thereby he derived access to his land. But even at the time of Commissioner's visit, they were not able to identify the alternative pathway available for the plaintiffs.

12. Through Exs.A1, A2 and A11 to A14, B6 to B8 as well as the Commissioner's report, the plaintiffs able to establish that there was a customary cart track available for them to reach their lands and the same is 'B' schedule cart track, though it was obliterated and new pathway was formed by the defendants, but the plaintiffs have right to have access to reach their lands through the old mamool pathway and the same cannot be prevented by the defendants because from the time immemorial nearly about the year of 1984 onwards, the said cart track was used by the plaintiffs predecessors in title.

13. The following authorities relied by the respondents, viz.,

(i) **1998-1- L.W.654 (Sellappa Gounder and 4 others ..vs.. Natesan and two others)**, wherein it is held that,

“7. For appreciating the stand taken by the learned counsel appearing on either side, the relevancy



as also the efficacy of Ex.A1, it would be necessary to advert to the relevant guidelines contained in the 'Tamil Nadu Survey Manual of Departmental Rules', which particularly indicate the manner of preparation of the Field Maps. In paragraph 18 of Chapter VI, it is stated that all roads, cart-tracks and channels shown as porambokes in the revenue accounts and those which are included in the ryotwari holdings and which exceed 20 links (4 meters) in width should be demarcated as separate Survey Fields if half a chain (10 metres) or over in width. At the same time, the officer in charge of the Survey Party is given the discretion to survey such cart track or a channel as a sub-division in order to secure well shaped Survey Fields. It is also stated that the former should be surveyed as sub divisions when they are less than 50 links (10 metres) and the latter over 20 links (4 metres) and less than 50 links (10 metres) in width. Such of those included in the ryotwari holdings which do not exceed 20 links (4 metres) in width and those included in large waste blocks which are not to be surveyed in detail, should not, except in special case to be determined by the Revenue Officer, be sub-divided, but marked as “details”. Similarly, in paragraph 7 of Chapter VII, it is stated that the



position of all important topographical details, such as village sites, public buildings, channels, streams, tanks, wells, cart tracks, footpaths etc., whether separately marked or not as Survey Fields or sub-divisions, should be fixed by measurement and only those footpaths which lead from one village to another village or from one hamlet to another hamlet should be regarded as important. From the above information disclosed in the Manual, it could be gathered that in respect of ryotwari holdings, the roads, cart tracks, channels, if any, existing which do not exceed 20 links (4 metres) in width need not be sub divided and that it can be marked as “details”. The Field Map for Field Number 90 marked as Ex.A1 contains no doubt, what in the Survey parlance used to be referred to as “details”. The plaintiffs, if at all, could claim any rights on the basis of documents, particularly, Ex.A1, their rights have to be confined to only that portion of the Field Number 90, which contains the “details” marked in the plan itself. Merely because the other pathway is in continuation thereof in the patta lands of the defendants and is found on state of ground, from that alone, the plaintiffs cannot claim as a matter of right any right of user to the other portion also, as rightly



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contended by the respondents. May be, that such portion or part of the pathway in continuation has been cared out for the use of the respective land owners or for other when so permitted by the owners of the lands in which the pathway exists. From that alone, the plaintiffs cannot claim any absolute right unless it has been substantiated to be a right by way of easement of necessity or an acquisition of any easement by prescription.”

(ii) 2020 (6) CTC 320 (Nazir Mohammed ..vs.. J.Kamala and others), wherein it is held that,

“Right of appeal conferred by Statute and Court cannot expand scope of Appeal beyond right conferred by Statute. Second Appeal lies only on substantial questions of law. Re-agitating facts or re-appreciating evidence in Second Appeal is not permissible. Second Appeal cannot be entertained, if question of law or even mixed question of law and facts not urged before lower Courts. Courts must be satisfied that case involves substantial questions of law and nor mere question of law. Existence of substantial questions of law is sine qua non for exercising jurisdiction under Section 100 CPC. Question of law is “substantial” if :



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- (i) debatable,*
- (ii) not previously settled by law or binding precedent, and*
- (iii) has material bearing on decision of case and/or affects rights of parties.*

Substantial questions of law also arises if decision is contrary to settled legal principles, binding precedents or express provision of law. Decision made in Second Appeal without formulating substantial questions of law is vitiated. Formulation of substantial questions of law is mandatory. Mere reference to grounds of appeal is not sufficient.”

are not applicable to the facts of the case for the reason that the plaintiffs proved that their easementary right over the 'B' schedule cart track and its existence for several decades. The right to use the said pathway is attached with the properties even though old one was obliterated and new one was formed by the defendants before the suit.

14. Therefore, both the courts below failed to appreciate the documents adduced on the side of both sides, with regard to the existence of



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the customary cart track and erroneously held that the plaintiffs not proved their enjoyment over the 'B' schedule cart track, as such it is unjustifiable and misconception of law and liable to be set aside. Accordingly, questions of (a), (b) and (c) are answered. Hence, the plaintiffs are entitled only to use the 'B' schedule suit cart track for ingress and egress to their lands in 'A' schedule property and the defendants are not entitled to cause any obstruction.

15. Accordingly, the judgment and decree 02.08.2013 made in A.S.No.22 of 2011 on the file of learned Principal Subordinate Court, Coimbatore is set aside and the suit in O.S.No.2029 of 2006 on the file of learned II Additional District Munsif Court, Coimbatore is decreed as prayed for. No costs. The Second Appeal is allowed. Consequently, connected Miscellaneous Petitions are closed.

Mra
Index : yes/no
Internet : yes/no
Speaking/Non-speaking order
To

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1. The Principal Subordinate Judge,
Coimbatore.



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2. The II Additional District Munsif,
Coimbatore.

3. The Section Officer
Vernacular Records Section
High Court, Madras.



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T.V.THAMILSELVI, J

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Judgment in
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