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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26 / 04 / 2022

CORAM

THE HON'BLE MR.JUSTICE M.GOVINDARAJ

SA NO.452 OF 2017
AND CMP NOS.11236 TO 11238 OF 2017

1.K.A.Gothavariammal (Died)
2.C.A.Dhanalakshmi Ammal
3.K.A.Pankaja Parameswari
4.K.A.Padmavathy
5.K.P.Radha Rukmini
(Appellants 2 to 5 brought on record as
LRs' of the deceased sole appellant
vide K.A.Gothavariammal vide
Court order dated 24.11.2021 made in
CMP Nos.18125, 18130 and 18132/2019
in SA No.452 of 2017)

...Appellant/Respondent/Plaintiff

VS.

1.Ariya Gounder
2.Palaniammal
3.Thangamuthu
4.Velayutham

...Respondents 1 to 4/
Appellants 1 to 3/Defendant 1 to 4/
2nd Respondent

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, 1908, against the judgment and decree dated 29.11.2011 in A.S.No.64 of 2009 on the file of the learned Subordinate Judge, Gobichettypalayam, reversing the judgment and decree dated 24.08.2006 of the Trial Court in O.S.NO.151 of 2004 on the file of the learned District Munsif, Gobichettypalayam, granting the relief of permanent injunction in favour of the appellant and dismissing the claim for mandatory injunction of the respondents.

For Appellants : Ms.Puran Khemka
For Respondents : Mr.A.V.Arun



J U D G M E N T

Aggrieved over the reversal of the judgment and decree passed by the Trial Court, by the First Appellate Court, the appellant has preferred the above Second Appeal.

2. For the sake of convenience, the parties are called as per their ranking in the Suit. During the pendency of the Second Appeal, the sole appellant/plaintiff died and her legal representatives are brought on record.

3. According to the plaintiff, the plaintiff has derived title to the suit property through the WILL executed by her husband on 27.12.1964. The new survey number of the property is S.F.2 and later sub-divided as S.F.Nos.2/1, 2/2, 2/3 and 2/4. The plaintiff sold four acres of land in S.No.2/1 in favour of the defendants by virtue of two registered sale deeds dated 10.02.1982. Even before that, she sold four acres of land in S.Nos.2/3 and 2/4 in favour of one Sennimalai Gounder. The defendants and the said Sennimalai Gounder were using the Cart Track lying between their properties and enjoying the same without any issues. The Cart Track shown on the west of point "H" in the plan annexed to the plaint extensively belongs to the plaintiff and the defendants do not have any right over the Cart Track from the point "H". On 03.03.2004, the plaintiff filed an application for survey to determine the boundaries. After issuing notice, the Surveyor measured the properties and erected stone pillars and put wire fence on the boundaries, which was marked as ABCD in the plan annexed to the plaint. The plaintiff had fenced the boundaries with barbed wire and stone pillars. On 26.03.2004, the defendants have threatened to damage the stones and remove the barbed wire fence on the ill-advice of the enemies of the plaintiff. Hence, she filed a Suit for permanent injunction restraining the defendants from damaging or removing the fence from her land.

4. Denying the claim of the plaintiff, the defendants would state that by virtue of the sale deed dated 10.02.1982, the plaintiff has granted easementary right in respect of the Cart Track belonging to her on the western side of their property to a width of 24 links running south north track of the plaintiff. In violation of the grant, the fence has been put up by the plaintiff. The plaintiff is estopped from denying the easementary right of the defendants by grant.



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5.The Trial Court appointed an Advocate Commissioner to find out the physical features and the Advocate Commissioner in his report would state that there exist a 15 feet width of land having Coconut trees on both sides of the borders, but the surfaces were uneven and there was no trace of usage in the near past 20 years.

6.The Trial Court framed the following issues:-

(1) whether the plaintiff is entitled to permanent injunction as prayed for ?

(2) whether the Suit is bad for non-joinder of the necessary party ?

(3) Whether the plaintiff is estopped from denying the easementary right?

(4) Whether the defendants have got easementary right of path over the suit property?

(5) Whether the defendants are entitled to mandatory injunction prayed for both of them.

7.After holding that as Exs.B1 and B4, the sale deeds executed by the plaintiff in favour of the defendants, the right of easement is granted by the plaintiff in favour of the defendants, it was found that the easement is extinguished due to the non-user for past near 20 years as per Section 47 of the Indian Easements Act, 1882. Hence, the Trial Court decreed the suit in favour of the plaintiff and rejected the counter claim by the defendants. On appeal, the First Appellate Court reversed the finding on the ground that the easement by grant will not get extinguished merely because the co-sharer has an alternative way. It was held that the defendants are entitled to the easementary right forever and granted the relief of mandatory injunction in favour of the defendants.

8.Aggrieved over the same, the plaintiff has preferred the above Second Appeal on the following substantial questions of law:-

"1.Whether the learned Appellate Court is right in thrusting the burden of proof on the appellant, then the Respondents have come forward with prayer of Mandatory Injunction in respect of suit property.

2.In absence of objection to Commissioner's report by the Respondents, which Commissioner was appointed at the instance of respondents, can the Lower Appellate Court



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unilaterally ignore the evidence of Commissioner and arrive at a contrary findings.

3. Whether the interference of the Appellate Court based on the recitals of the Boundary in Exhibit B1 and B4 to conclude its represents suit Cart Track is perverse that too when the Commissioner's Report has not been challenged by the Respondents.

4. Whether when the extinguishment of the easement by non user under 47 is attracted with all fours in the instant case, whether the Appellate Court is right in rejecting the defense of non user by holding there can be no extinction of easement by grant.

5. Whether the Appellate Court otherwise justified in granting mandatory injunction when the appeal itself has been not diligently prosecuted by the Respondents.

6. Whether the Lower Appellate Court is right in discard the evidence of Commissioner, when the same has not been challenged by the Respondents by way of objection.

7. Whether the conclusion of Lower Appellate Court in favour of the Respondents, in respect of easement by grant, based on B1 and B4 in absence of evidence of usage of suit property as "Cart Tract" is sustainable in law. "

9. By consent of both sides, the Second Appeal was taken up for final hearing on the substantial question of law no.4 as to whether when the extinguishment of the easement by non-user under 47 of the Indian Easements Act, 1882, is attracted with all fours and whether the Appellate Court is right in rejecting the defense of non-user by holding there can be no extinction of easement by grant.

10. Now that, it has to be seen as to whether the easement by grant gets extinguished in view of Section 47 for non-user for the past 20 years. Admittedly, the plaintiff derived title to the suit property by virtue of the WILL executed by her husband on 30.11.1964, which is marked as Ex.A1. In the said WILL, there was no mentioning of any Cart Track between the lands sold by the plaintiff in S.Nos.2/1, 2/3 and 2/4. If at all there was a Cart Track and the defendants are entitled to use the Cart Track, that should have been mentioned in the WILL vide Ex.A1. But there is no mention to the Cart Track. Secondly, even assuming that the Cart Track was created



and the property was sold to the said Sennimalai Gounder and the defendants, even then the boundaries of the property should mention the existence of the Cart Track and the easementary right. Whereas, the sale deed executed in favour of the defendants vide Exs.B1 and B4 clearly mentions that the eastern boundary of the property belongs to Sennimalai Gounder. There was no mention of the Cart Track on the eastern boundary. Even in the Advocate Commissioner's report, there is no mention about the Cart Track on the eastern boundary of the defendants property which was sold by the plaintiff and her daughter vide Exs.B1 and B4.

11. Therefore, the existence of a Cart Track between the lands of the defendants and the Sennimalai Gounder is not proved by the plaintiff. The said Sennimalai Gounder was also not impleaded as a party to speak about the existence and joint enjoyment of the Cart Track by him and the defendants. In the absence of any independent evidence, the contention of the plaintiff that the defendants are using the Cart Track existing between the defendants land and Sennimalai Gounder's lands fails.

12. The boundaries mentioned in Ex.B1 reads as under:

On the west, Sennimalai Gounder's property
On the north, forest land
On the south, the property sold vide Ex.B4; and
On the west, 24 links width Cart Track running south north.

13. From the boundaries, it is noted that the property is land locked on three sides, namely east, south and north. The only access available is on the west, the Cart Track owned by the vendor, the plaintiff herein. That Cart Track runs from point "AH" till the northern boundary, which is forest lands. It is imperative to note that there is a specific recital in Ex.B1 that easementary right was granted in favour of the defendants from the south pit to the Cart Track running south north.

14. The plaintiff in para 5 of the plaint would clearly mention that the S.Nos.2/3 and 2/4 situate west of south north pit. In that description, if it is seen the south to north pit situate at the point of "AH". The easement is granted from south pit to the Cart Track having width of 24 links on the western boundary of the defendants. Therefore, it is crystal clear that the Cart Track which is mentioned in Exs.B1 and B4 is



a suit property. There is no other Cart Track existing as claimed by the plaintiff.

15. Both the Courts below had concurrently found that the Suit property is a Cart Track and the defendants were granted easementary right over the same. The Trial Court has held that the easement by grant got extinguished by non user as there is no evidence on the side of the defendants to prove that they were using the Cart Track for 20 years.

16. The Hon'ble Supreme Court in HERO VINOTH (MINOR) VS. SESHAMMAL [2006 (4) CTC 79] has categorically held as follows:

"24. The principles relating to Section 100 CPC, relevant for this case, may be summarised thus:-

(i) An inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.

(ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.



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(iii) The general rule is that High Court will not interfere with concurrent findings of the Courts below. But it is not an absolute rule. Some of the well recognized exceptions are where (i) the courts below have ignored material evidence or acted on no evidence;

(ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to 'decision based on no evidence', it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding.

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



access is available, the acquisition of grant will not get extinguished. Therefore, the reversal of the judgment of the Trial Court on the ground that easement got extinguished by non user under Section 47 of the Indian Easements Act, 1882 is not attracted to easement by grant is absolutely correct. In view of the above finding, the substantial question of law is answered against the appellants.

19. In the result, the Second Appeal stands dismissed. No costs. Consequently, connected Civil Miscellaneous Petitions are closed.

s/d-
Assistant Registrar

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Sub-Assistant Registrar

TK
To

1. The Subordinate Judge
Subordinate Court
Gobichettypalayam.

2. The District Munsif
District Munsif Court
Gobichettypalayam.

+2 CCs to Mr. K. Shakespeare, Advocate sr 28409.

SA NO.452 OF 2017

NR(CO)
SP(10/06/2022)