



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

JUDGMENT RESERVED ON : 09.02.2022

JUDGMENT PRONOUNDED ON : 15.02.2022

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CORAM:

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

S.A. (MD) .No.5 of 2019

and

CMP (MD) .No.204 of 2019

1.Ayyasami

2.Vanitha

...Appellants/Respondents/Defendants

Vs

Periyasami (late)

1.Dhanushkodi

2.Muthuramu

(Respondents themselves
as representatives of
Mangulam village)

...Respondents/Appellants/Plaintiffs

PRAYER : Second Appeal is filed under Section 100 of C.P.C, against the judgment and decree dated 21.08.2018 passed in A.S.No.15 of 2017 on the file of the Subordinate Judge, Aruppukkottai reversing the judgment and decree dated 04.10.2016 passed in O.S.No.296 of 2012 on the file of the Principal District Munsif Court, Aruppukkottai.

For Appellants : Mr.D.Ferdinand

For Respondents : No appearance

JUDGMENT

The defendants are the appellants.

2.The plaintiffs filed O.S.No.296 of 2012 before the Principal District Munsif Court, Aruppukkottai for declaration that the plaintiffs are entitled to use the suit cart track and for permanent injunction restraining the defendants from any way fencing

<https://hcmjss.court.gov.in/ctserviceack>.

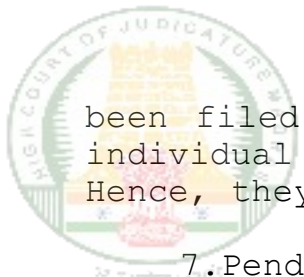


3.The suit was dismissed by the trial Court. The plaintiffs filed A.S.No.15 of 2017 before the Subordinate Court, Aruppukkottai. The learned Subordinate Judge was pleased to allow the appeal and decreed the suit as prayed for. As against the same, the present second appeal has been filed by the defendants.

4.The plaintiffs have filed the suit in their representative capacity on behalf of the villagers of Mankulam Village and also in their individual capacity. The plaintiffs had contended that the suit schedule property is a public pathway, it falls within Survey Nos. 36, 37, 38 and Survey Nos.167 and 168 running in the north-south direction with north -south measurement of 650 feet and east-west measurement of 15 feet. The plaintiffs further contended that this is the only cart track available to connect the residential houses on the southern side and the agricultural lands located on the northern side of the village. The plaintiffs further contended that the villagers of Mankulam have to use only this cart track to reach the four other villages.

5.According to the plaintiffs, the cattle, tractors and agricultural products are being taken only through the suit pathway. The plaintiffs further contended that the suit pathway is in existence on the north as well as the southern side. The plaintiffs further contended that they have been enjoying the said cart track for more than the statutory period. The plaintiffs further contended that the defendants are having agricultural properties just east of the cart track and they attempted to fence the cart track also along with their property. The plaintiffs further contended that on the western side of the cart track, so many villagers are having registered sale deeds in which the eastern boundary is shown as the cart track. Hence, they prayed for declaration and permanent injunction.

6.The defendants filed a written statement contending that the alleged cart track does not run through their private patta land namely Survey Nos.167 and 168. They further contended that the western boundary of the property purchased by them under Exhibit A2 indicates that there is a cart track. Hence, the defendants contended that no cart track runs through their private patta land. The defendants further contended that they have not encroached upon any public property much less a public cart track. The defendants further contended that the plaintiffs are having the properties to the west of the cart track and they have annexed the cart track to their own property. After annexing the cart track with their own property, now, they are attempting to create a new cart track into the private patta land of the defendants. The defendants further contended that they are entitled to fence their own private patta land and the plaintiffs cannot raise any objection to the said fencing. The defendants further contended that the plaintiffs are

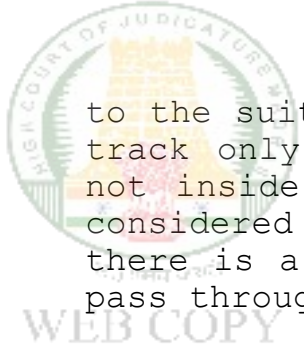


been filed only with a personal motive by the plaintiffs in their individual capacity in order to grab the property of the defendants. Hence, they prayed for dismissal of the suit.

7. Pending suit, at the instance of the plaintiffs, An Advocate Commissioner was appointed In I.A.No.308 of 2012. He filed a report and plan. As per the said report, the commissioner found that just on the western side of the alleged suit cart track, the properties of the plaintiffs are located. The defendants' properties are located on the eastern side of the suit cart track. The commissioner also found that the suit cart track does not pass through survey Nos. 36 or 37, it only passes through Survey Nos.38, 167 and 168. For the said report, the defendants in the suit filed an objection contending that the commissioner has not found the starting point of the alleged cart track and where cart track ends.

8. The trial court after considering the oral and documentary evidence, came to a conclusion that the plaintiffs are alleging that the suit property is the public cart track and hence, the burden is upon them to prove the same. The trial Court also found that the case of the plaintiffs is that the suit cart track passes through the Survey Nos. 36 and 37 has not been proved, in view of the commissioner's report. Hence, according to the findings of the trial Court, even after the commissioner's report, the plaintiffs neither filed any objection to the commissioner's report nor made any attempt to amend the plaint with regard to the survey numbers through which the cart track passes. Hence, the Court arrived at a finding that they have not described the suit schedule property properly.

9. The trial Court also considered the evidence of PW1 and arrived at a conclusion that only based upon the directions of the plaintiffs, the commissioner had identified the suit cart track and hence, the commissioner's report cannot be accepted. The plaintiffs had contended that the suit cart track is in existence for more than 200 years, but they have not chosen to examine any independent witness to prove the same. That apart, the suit cart track is not reflected during the settlement proceedings, UDR proceedings or during natham settlement proceedings. The said cart track alleged to have a width of 15 feet is not reflected in any one of the Government documents. On the other hand, for Survey Nos.167 and 168, patta has been granted in favour of the defendants under Exhibit A3. The village administrative officer of the suit village was examined as PW2. He has categorically deposed that there is no reference in any one of the Government documents with regard to the suit cart track in Survey Nos.36, 37, 38, 167 and 168 and through him Exhibits X1 to X8 were marked. Even these documents did not reflect any cart track. An independent witness was examined as PW3 on the side of the plaintiffs. He had deposed that he is not aware where the suit cart track commences and where it terminates. He has further admitted



to the suit cart track. In fact, he has admitted that the suit cart track only passes on the boundary of the defendants' property and not inside the properties of the defendants. The trial Court also considered the evidence of DW1 to the effect that he admits that there is a cart track to the west of his property, but it does not pass through his property.

10.The trial Court has also considered Exhibits B1 to B3 which is a patta transfer order, 'A' register and FMB sketch. All these documents, does not indicate any cart track in the suit property. The trial Court also considered the fact that the plaintiffs have not pleaded any easementary right in their plaint and hence, they would not be entitle to let in any evidence claiming easementary right over the suit cart track. The trial Court found that the plaintiffs have not established any continuous usage of the suit cart track for more than the statutory period without any interruption to claim easementary right of prescription. Based upon the said findings, the trial Court dismissed the suit.

11.The First Appellate Court reversed the findings of the trial Court on the following findings;

(a)The plaintiffs are claiming easementary rights over the defendants' property and hence, the absence of revenue records cannot be a ground for non-suiting the plaintiffs.

(b)The plaintiffs have let in oral evidence claiming that the villagers are using the cart track for more than 500 years and hence, they have proved the usage from time immemorial.

(c)PW1, PW3, DW1 and DW2 all belong to the same village and hence, the findings of the trial Court that the none of the villagers have been examined is not correct.

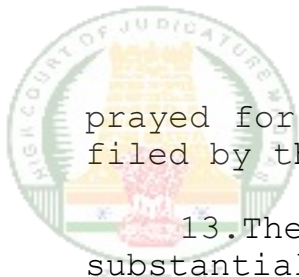
(d) The villagers who are having properties on either side of the cart track have given up their right over some portions of their lands to create the common cart track. Hence, the villagers are having a easement by grant.

(e)Though the defendants are the owners of the properties as per title deeds and the revenue records, the defendants are not having any right to claim back the right given up for easement of the villagers.

(f)The defendants have no right to fence their own lands which has acquired the character of the easementary right when the same was used and enjoyed by the villagers from time immemorial.

(g)where the easementary right has been acquired by grant of both sides of the common cart track, there need not be any evidence to show that there was an alternative pathway.

12.The First Appellate Court relied upon various decisions of the Hon'ble Supreme Court and arrived at a finding that the plaintiffs have proved easement of grant, easement of necessity and also easement by way of prescription over the suit cart track and



prayed for. As against the same, the present second appeal has been filed by the defendants.

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

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(i)When admittedly the description of property in the plaint is wrong and the plaintiffs have not taken any steps to amend the same and the same is in-executable, whether the first appellate Court is correct in decreeing the suit as prayed for?

(ii)when the plaintiffs have not established the existence of the alleged cart-track and there is no entry in the revenue records and field maps, whether the first appellate Court is correct in coming to the conclusion that the plaintiffs have proved the existence of the cart track?

(iii) When objections were filed to the Commissioner's reports both preliminary and final, whether they can be relied upon without examining the Advocate Commissioner?

14.The learned counsel for the appellants contended that the plaintiffs are not clear in their pleadings whether the suit pathway is a common cart track or a public cart track. From the pleadings, it could be seen that the plaintiffs are really claiming a public cart track for the benefit of the villagers since the present suit has been filed in the representative capacity of the villagers. The plaintiffs have contended that the suit cart track runs through Survey Nos. 36, 37, 38, 167 and 168. However, the Advocate Commissioner has specifically found that the alleged cart track does not run through the Survey Nos.36 and 37. A perusal of the commissioner's plan would indicate that the plaintiffs' case in the plaint has been falsified by the commissioner's report. That apart, the plaintiffs have identified some portions of the properties as a cart track and requested the Advocate Commissioner to note down the physical features. The Advocate Commissioner has not considered the sale deed of the defendants or the records. That apart, none of the plaintiffs have produced their title deeds to show that they have parted with their lands to create a common cart track. If they have produced their title deeds, it would be evidenced whether any cart track runs on their eastern boundary. However, none of the plaintiffs or villagers have chosen to produce their sale deeds to show that the common cart track which is the alleged to be in existence for more than 500 years .

15.The learned counsel for the appellants further contended that the plaintiffs have claimed three types of easement with vague pleadings in their plaint. He further contended that they are using the common cart track for time immemorial, thereby, claiming easement by prescription. He has also contended that they have pleaded there is no other alternative cart track to reach the northern villagers thereby claiming easement by necessity. The



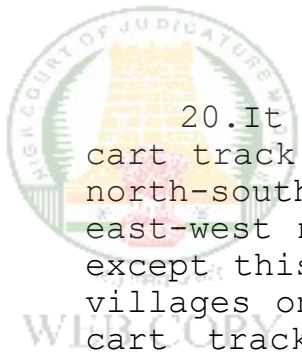
plaintiffs have also contended that all the documents of the villagers on the western side of the cart track will indicate the suit cart track as their eastern boundary and thereby claiming easement by grant. The plaintiffs are not sure about the nature or type of easement that they are claiming over the alleged suit cart track.

16.The learned counsel further contended that the western boundary of the property purchased by the defendants under Exhibit A2 clearly shows that there is a cart track on the western side of the defendants' property. The plaintiffs' property are located on the western side of the cart track. The plaintiffs have encroached upon the cart track and they are attempting to push the alleged cart track into the property of the defendants and preventing the defendants from fencing the property. If really there is a public cart track for more than 500 years with a width of 15 feet, certainly it would have been reflected in the Government documents. He further contended that the plaintiffs with a motive to grab the defendants' property have filed the present the suit alleging to be in the representative capacity of the villagers. The villagers have not come forward to depose about the common cart track. They have also not chosen to produce their respective title deeds to indicate the common cart track which is said to be in existence for more than 500 years.

17.The learned counsel for the appellants further contended that the First Appellate Court without any proper pleadings on the side of the plaintiffs, has proceeded to hold that the plaintiffs have acquired easementary right by grant. In fact, there is no pleadings to the said effect in the plaint. The First Appellate Court has relied upon several judgments of the Hon'ble Supreme Court and High Court without any pleadings or evidence to that effect on the side of the plaintiffs to arrive at a conclusion that the plaintiffs are having easement by grant. He further contended that though the plaintiffs have pleaded that the eastern boundary of the owners whose property is located on the western side of the cart track will reveal the existence of the cart track, not a single document has been produced on the side of the plaintiffs. Even the plaintiffs have not produced their own sale deeds. Hence, the First Appellate court was not right in arriving at a conclusion that the land owners have given up their right over some portions of the land to create a common cart track. Hence, he prayed for allowing the second appeal.

18.Even though the respondents have been served, there is no representation on the side of the respondents.

19.I have considered the submissions made on the side of the appellants.



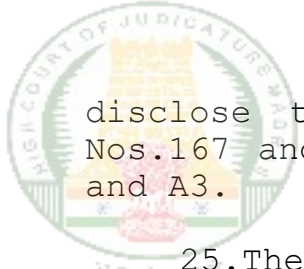
20.It is the specific case of the plaintiffs that there is a cart track running in Survey Nos.36, 37, 38, 167 and 168 running in north-south directions with north-south measurement of 650 feet and east-west measurement of 15 feet. The plaintiffs have pleaded that except this cart track, there is no other cart track to connect the villages on the northern side. They have further contended that the cart track is being used by the villagers for more than the statutory period. The plaintiffs have also pleaded that the eastern boundary of all the owners on the western side of the cart track will clearly reveal the existence of a public cart track. When the plaintiffs have pleaded the existence of a public cart track in the said survey number, the burden is upon the plaintiff to establish the same. The present suit has been filed by the plaintiffs in the representative capacity on behalf of the villagers.

21.The final report filed by the Advocate Commissioner would reveal that the alleged cart track does not run through the Survey No.36 of 37. In fact, the alleged cart track was identified by the plaintiffs. The commissioner has found that a small portion of the cart track runs in Survey No.38 and huge portion of the alleged cart track runs in Survey Nos.167 and 168 which are the patta lands of the defendants. The revenue authorities who were examined on the side of the plaintiffs have admitted that there are no documents for the existence of cart track in the suit survey numbers. The defendants have chosen to file Exhibit B1 which is the proceedings issued by the Tahsildar. The said proceedings does not indicate about the presence of any pathway or any road in Survey Nos.167 and 168.

22.The 'A' register for Survey Nos.167 and 168 has marked as Exhibit B2 on the side of the defendants. The said document also does not disclose the presence of any cart track as alleged by the plaintiffs. Exhibit B3 is the village map obtained from the Central Survey office at Chennai. The said document also does not disclose that there was any cart track in Survey Nos.167 and 168. The plaintiffs have not filed any public records to establish that there is a public cart track in the suit survey numbers.

23.The plaintiffs have filed a plaint plan as Exhibit A1. The defendants' sale deed as Exhibit A2 and the defendants' patta as Exhibit A3. Exhibit A4 is the representation given by some of the villagers to the District Collector and Exhibit A5 is the acknowledgment issued by the Collector. Apart from these five documents, no public document or private document has been filed on the side of the plaintiffs.

24.A perusal of Exhibit A2 sale deed indicates that a cart track runs to the west of the property purchased by the defendants. It means the cart track is located to the west of survey Nos.167 and 168. Exhibit A3 also reflects the same. Hence, even the private documents were filed on the side of the plaintiffs does not



disclose that the public cart track is running through Survey Nos.167 and 168 which belong to the defendants as per Exhibits A2 and A3.

25.The plaintiffs have specifically contended that the eastern boundary of all the owners whose properties are located on the west of the cart track will clearly indicate the existence of suit cart track, but not a single title deed has been produced on the side of the plaintiffs to establish the same. As per the commissioner's report, the plaintiffs are having property on the west of the cart track. Even the plaintiffs have not not chosen to produce their own sale deeds to establish the existence of a cart track.

26.The main allegations of the plaintiffs is that the defendants are attempting to fence the cart track also. On the other hand, the defendants have alleged that the plaintiffs have already encroached over the cart track and now, trying to create a cart track in the private patta property of the defendants. The absence of documents on the side of the plaintiffs with regard to the boundary recitals in various sale deeds, strengthen the case of the defendants. The Court has to necessarily draw adverse inference as against the plaintiffs for not producing even their own sale deeds to establish the existence of a cart track on their eastern boundary.

27.The Village Administrative Officer has been examined as PW2. He has categorically deposed that there is no cart track as alleged by the plaintiffs in the suit survey numbers. PW3 is an independent witness who was examined to prove the existence of a cart track. He has admitted in the cross examination that his sale deed does not disclose the cart track in any one of the boundaries. He has further admitted that the suit alleged cart track does not run through the patta land of the plaintiffs, but only on the western side of the patta land of the defendants. Hence, none of the witnesses examined on the side of the plaintiffs support the case of the plaintiffs.

28.On the other hand, the defendants have categorically deposed that a cart track is running only to the west of their private patta land and the plaintiffs are attempting to create a pathway into the patta land after encroaching the cart track.

29.Though the plaintiffs have contended that they have been using the suit cart track for more than the statutory period, no oral or documentary evidence has been produced on their side to establish that they have acquired easementary right by prescription over the properties of the defendants. If really, the suit cart track is 15 feet in width and it is the only cart track available to connect various villages, the same would have been reflected in the public records, especially when the same is alleged to be in use for more than 200 years. Hence, the plaintiffs have not established their usage of the suit cart track over the statutory period either

<https://hdservices.courts.gov.in/toc/servlet> or public documents.



30.The First Appellate Court has given a finding that the parties on either side of their cart track have given up some portions of their property to create a suit cart track. The defendants' ancestor in title would have also given up some portions of their properties and hence, the present owners of Survey Nos. 167 and 168 are estopped from disputing the said cart track. In fact, there is no pleadings on the side of the plaintiffs that all the parties on either side of the cart track have given up some portions of their property to create a cart track. That apart, not a single document has been produced on the side of the plaintiffs to establish that the suit cart track is one of the boundaries in any one of the sale deeds. The plaintiffs have not even produced their own sale deeds to establish the existence of a cart track on their eastern side. Hence, the First Appellate Court was not right in holding that the parties on either side of the cart track have given up some portions of their properties to create a cart track. The findings of the First Appellate Court that the claim of the plaintiffs can be construed to be an easement by grant is also not sustainable in law, in view of the fact that the plaintiffs have not produced any document to show the existence of a cart track in any one of the properties leave alone the plaintiffs' property. When the plaintiffs have miserably failed to produce any document which shows a cart track, the First Appellate Court has grossly erred in taking up a special plea of easement by grant.

31.The First Appellate Court has relied upon many Hon'ble Supreme Court judgments to arrive at a finding that an easement by grant can even be implied and need not be expressed. There are no document in the present suit even to arrive at a finding that there is an implied grant. The plaintiffs have pleaded easement by necessity, easement by grant and also the easement by prescription. It is settled position of law, each type of easement requires different pleadings. In the present case, the plaintiffs attempted to claim a cart track in the suit survey numbers based on three different types of easementary rights, but they are unsuccessful in proving any one of them. The First Appellate Court has decreed the suit contrary to the pleadings and evidence and hence, this case warrants interference in the second appeal.

32.In view of the above discussion, the substantial questions of law are answered as follows:

(i)The description of the property in the plaint is shown to be erroneous based upon the commissioner's report. Even thereafter, the plaintiffs have not chosen to amend the plaint. Hence, any decree granted would only be inexecutable.

(ii)There are no entries in the revenue records and field maps and hence, the First Appellate Court was not right in coming to the conclusion that the plaintiffs have proved the existence of a cart



(iii)The First Appellate Court erred in relying upon the Advocate commissioner's report without examination of the Advocate commissioner, when the defendants have filed their objections to the same.

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33.In view of the above said discussions, the judgment and decree of the First Appellate Court is set aside and the judgment and decree of the trial Court is restored. The second appeal is allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-III)

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/ /2022

Sub Assistant Registrar(CS)

msa

To

1.The Subordinate Judge, Aruppukkottai

2.The Principal District Munsif, Aruppukkottai

3.The Section Officer

V.R.Section

Madurai Bench of Madras High Court

Madurai (2 copies)

+1 CC to M/s.POLAX LEGAL SOLUTIONS, Advocate (SR-6124[F] dated 15/02/2022)

S.A. (MD) .No.5 of 2019

and

CMP (MD) .No.204 of 2019

15.02.2022

RK(08/03/2022) 10P 6C