



WEB COPY



S.A.No.143 of 2017

**IN THE HIGH COURT OF JUDICATURE AT MADRAS**

**DATED : 03.11.2023**

**CORAM**

**THE HONOURABLE MR.JUSTICE S.SOUNTHAR**

**S.A.No.143 of 2017**

Sengodan

... Appellant

VS.

1.Nagarajan

2.Venkatesan

3.Marrappan

... Respondents

**PRAYER:** Second Appeal is filed under Section 100 of Civil Procedure Code, to set aside the Judgment and Decree dated 21.11.2014 of the learned Subordinate Judge, Mettur and made in A.S.No.24 of 2013 confirming the Judgment and Decree dated 22.02.2013 and made in O.S.No.76 of 2003 on the file of the learned District Munsif cum Judicial Magistrate Court, Omallur.

For Appellant : Mr.V.R.Rajasekaran

For R1 and R2 : Mr.G.Suriyanarayanan

For R3 : No Appearance

**J U D G E M E N T**



S.A.No.143 of 2017

**WEB COPY** The unsuccessful 1<sup>st</sup> defendant, who suffered a decree for declaration and injunction has come before this Court by way of this second appeal. The respondents 1 and 2 filed a suit for declaration of their right of user over the suit common cart-track and for permanent injunction restraining the appellant and the 3<sup>rd</sup> respondent from interfering with their right of user. The Trial Court decreed the suit. The first appeal filed by the appellant was also dismissed. Hence, the unsuccessful 1<sup>st</sup> defendant is before this Court.

2. According to the respondents 1 and 2, they purchased the suit property under the registered Sale Deed dated 22.10.2001 from one Saroja Annapoorani. It was averred by them that in order to reach their land covered by said Sale Deed, there is a common cart-track running east-west on the northern side of the land. The said cart-track has been shown as ABCD in the rough plan filed along with the plaint. The land of the respondents 1 and 2 lies on southern side of the common cart-track and the appellant and 3<sup>rd</sup> respondent, who were arrayed as defendants in the suit own lands on the northern side of the cart-track. It was specifically alleged by the respondents 1 and 2 that they had been using the cart-track for more



S.A.No.143 of 2017

than 30 years with the knowledge of entire village including the defendants and therefore, they were entitled to user of the said common cart-track to reach their properties. As the appellant and 3<sup>rd</sup> respondent attempted to interfere with right of the respondents 1 and 2 to use common cart-track, they were constrained to file the above said suit seeking declaration of right of user and for permanent injunction.

3. The appellant herein filed written statement and the same was adopted by the 3<sup>rd</sup> respondent. It was claimed by the appellant that suit ABCD cart-track was not a common cart-track and the same situated in the patta lands belonged to the defendants. The appellant also denied the enjoyment of the suit cart-track by the respondents 1 and 2. It was averred by the appellant that suit ABCD cart-track was intended for the use of appellant and 3<sup>rd</sup> respondent to reach their lands from panchayath road and they were the absolute owners of the cart-track. It was also averred that any recital in the documents of the respondents 1 and 2 will not bind the appellant.

4. Before the Trial Court, the 1<sup>st</sup> respondent was examined as PW.1



S.A.No.143 of 2017

and 10 documents were marked on behalf of the respondents 1 and 2 as Exs.A1 to A10. On behalf of the appellant, he was examined as DW.1 and 4 documents were marked as Exs.B1 to B4. The Trial Court appointed an Advocate Commissioner to note down the physical features and his report and plan were marked as Exs.C1 and C2. The Trial Court on appreciation of oral and documentary evidences available on record, came to the conclusion that the respondents 1 and 2 proved their right of user over the suit cart track and accordingly, granted a decree for declaration and injunction. Aggrieved by the same, the appellant herein preferred first appeal in A.S.No.24 of 2013 on the file of the Sub Court, Mettur. The First Appellate Court also affirmed the findings of the Trial Court. Aggrieved by the said concurrent judgment and decree, the unsuccessful 1<sup>st</sup> defendant has come by way of this second appeal.

5. At the time of admission, this Court formulated the following substantial question of law:-

*“(i) Whether the Courts below have properly considered the issue of easement by necessity and had considered whether there was an alternative way?”*



S.A.No.143 of 2017

WEB COPY

6. Though this Court framed substantial question of law as mentioned earlier, a perusal of the pleadings of the respondents 1 and 2 would suggest there is no plea of easement by necessity and hence, after hearing the submissions of learned counsel appearing for the appellant, this Court formulated the following additional substantial question of law:-

*“Whether the findings of the Courts below that respondents 1 and 2 proved their plea of prescriptive easement is based on no evidence and vitiated by perversity?”*

7. The learned counsel appearing for the appellant and respondents 1 and 2 were heard on this additional substantial question of law.

8. The learned counsel appearing for the appellant submitted that the respondents 1 and 2 by relying on the recitals in the title documents claimed easement of prescription over the suit cart-track, which lies in the properties of the appellant and 3<sup>rd</sup> respondent. It is further submitted by the learned counsel any recital found in the title document of the respondents 1 and 2



S.A.No.143 of 2017

will not bind the appellant as he was not party to the same. The learned counsel further submitted that in the absence of any acceptable evidence on record to show that respondents 1 and 2 had been using the suit cart-track for more than 30 years out of their own right, the Courts below ought not to have granted a declaration of easementary right.

9. The learned counsel appearing for the respondents 1 and 2 by taking this Court to Ex.A1-Sale Deed in their favour and also Ex.A6-Partition Deed in the family of the defendants, submitted that in both the documents, there is a clear recitals about existence of east-west suit cart-track leading to Kamalapuram small lake from panchayat road on the western side. The learned counsel further by taking this Court to the Advocate Commissioner's report and plan, which were marked as Exs.C1 and C2 submitted that the Advocate Commissioner noted only one cart-track to enable the respondents 1 and 2 to reach their land in the absence of any other alternate pathway to enable the respondents 1 and 2 to reach their land, the Courts below justified in granting a decree as prayer for.

10. A perusal of the plaint averments clearly established that the



S.A.No.143 of 2017

respondents 1 and 2 claimed easement by prescription. Moreover, in the plaintiff averment, the respondents 1 and 2 have not pleaded that suit cart-track is the only access available to their land. The relevant averment of the respondents 1 and 2/plaintiffs in the plaint reads as follows:-

*“The plaintiffs own their lands on the southern side of the side common cart-track while the defendants own land on the northern side of the cart-track. Before that the plaintiffs vendors are using the cart-track for more than 30 years from the knowledge of entire village including the defendants.”*

11. Therefore, it is very clear that respondents 1 and 2 sought for declaration of easementary right by prescription. It is settled law in order to prove easement by prescription, the person claiming the right must show that he has been using the cart-track to the knowledge of owner of the property continuously for more than 20 years. In order to prove the long user of cart-track by the respondents 1 and 2 for more than the statutory period, the 1<sup>st</sup> respondent was examined as PW.1 and 10 documents were marked on behalf of the respondents 1 and 2/plaintiffs as Exs.A1 to A10.

12. The earliest document filed by the respondents 1 and 2 is Ex.A5



S.A.No.143 of 2017

dated 21.03.1994. It was a Sale Deed in favour of 3<sup>rd</sup> respondent by Thangavel, who happens to be the brother of appellant. The suit was filed in the year 2003. Therefore, none of the documents relied on by respondents 1 and 2 are more than 10 years old. In such circumstances, based on the recitals found in the documents, which are less than 10 years old, we cannot safely come to the conclusion that respondents 1 and 2 proved their continuous use for more than 30 years. If really the respondents 1 and 2 have been using cart-track for more than 30 years, they could have examined the neighbours of the lands to prove their long user. Unfortunately, only 1<sup>st</sup> respondent was examined as PW.1, no other independent witness was examined on behalf of respondents 1 and 2 to prove long user for more than 30 years. Based on the interested testimony of 1<sup>st</sup> respondent as PW.1, this Court cannot come to a conclusion that respondents 1 and 2 proved their long user of cart-track and acquisition of easement by prescription.

13. The learned counsel appearing for the respondents 1 and 2 submitted that a perusal of the Advocate Commissioner's report and plan, which were marked as Exs.C1 and C2 would suggest that there is no alternative cart-track available to reach the lands of respondents 1 and 2. As



S.A.No.143 of 2017

mentioned earlier, the respondents 1 and 2 in their plaint averment has not pleaded easement by necessity and they only pleaded easement by prescription. In such circumstances, this Court need not go to the question whether the respondents 1 and 2 have got any alternative pathway or not when it was not their case in their plaint.

14. It is settled law that easement of necessity has to be specifically pleaded and proved. In the case on hand, the respondents 1 and 2 have failed to raise any plea regarding easementary right by necessity. In such circumstances, the said contention made by the learned counsel for the respondents 1 and 2 is not acceptable to this Court.

15. In view of the discussions made earlier, the first question of law is not answered as it is not arising for consideration in this case. As far as the second question of law is concerned, the same is answered in favour of the appellant and against the respondents 1 and 2. Accordingly, the second appeal is allowed by setting aside the judgment and decree passed by the Courts below. The original suit filed by respondents 1 and 2 stands dismissed.



S.A.No.143 of 2017

WEB COPY **In Nutshell:-**

(i) The Second Appeal is Allowed by setting aside the judgment and decree passed by the Courts below.

(ii) The suit filed by the respondents 1 and 2 is dismissed.

(iii) In the facts and circumstances of the case, there will be no order as to costs.

**03.11.2023**

Index : Yes/No  
Speaking order : Yes/No  
Neutral Citation : Yes/No  
dm



S.A.No.143 of 2017

To

WEB COPY

1.The Subordinate Judge, Mettur.

2.The District Munsif cum Judicial Magistrate Court,  
Omallur.



WEB COPY



S.A.No.143 of 2017

**S.SOUNTHAR, J.**

dm

**S.A.No.143 of 2017**

**03.11.2023**