



S.A.No.1275 of 2012

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 19.10.2024

CORAM:

THE HONOURABLE MR. JUSTICE K. RAJASEKAR

Second Appeal No.1275 of 2012
and
Miscellaneous Petition No.1 of 2012

Padma

... Appellant/Plaintiff

Versus

Manickam

... Respondent / 2nd
defendant

Second Appeal filed under Section 100 of the Civil Procedure Code against the Judgment and the decree dated 13.09.2012 passed in A.S. No. 21 of 2012 on the file of the Subordinate Court, Harur, confirming the Judgment and Decree dated 30.01.2012 passed in O.S. No. 278 of 2004 on the file of the District Munsif, Harur.

For Appellant : Mr. R. Ezhilarasan

For Respondent : Mr. V. Nicholas

JUDGMENT

This Second Appeal has been filed by the plaintiff challenging the concurrent Judgment and decree of the Trial Court and the Lower Appellate



Court, rejecting the suit for relief of declaration and injunction filed by the appellant herein.

2. For the sake of convenience, the parties are referred as per their ranking in the Trial Court.

3. The plaintiff had purchased the land situated in the Southern side of the defendants' land from the defendants' vendor, as per Sale deed dated 18.02.1987. In the Sale deed, the plaintiff's vendor has granted permission to use the cart track situated on the Western side corner of the defendant's land, to reach their land shown as A, B, C, D in the Rough Plan. This cart track was being used by the plaintiff for more than 40 years. The first defendant now entered in to an Agreement of Sale with the second defendant. Due to previous enmity, on instigation of defendant No.2, defendant No.1 started preventing the plaintiff from using the cart track. The plaintiff further stated in the plaint that he is having a right based on easementary right of necessity and prescription thereby, filed the suit praying for declaration that he is entitled to use the land of the defendant and consequential injunction.

4. The defendants' filed written statement and contended that there is no cart track in existence as stated in the Sale deed, dated 18.02.1987



executed in favour of the plaintiff. The defendants' have purchased the land situated on the Northern side of the plaintiff's land, as per Sale deed dated 26.04.2004 and the entire land was used for agriculture purpose. The portion of land claimed to be a cart track is filled with rocks, bushes and stones. The claim is being made by suppressing the fact that the alleged cart track is running on the defendants' land and by obtaining interim order, the plaintiff was trying to lay the cart track in the plaintiff's land.

5. Based on the pleadings made by both parties, the trial Court has framed the following issues.

“1. Whether the plaintiff is entitled to relief as claimed in the suit?

2. Whether the plaintiff is entitled for permanent injunction as prayed for in the suit?

3. To what other relief the plaintiff is entitled for?”

6. After recording the evidence of both sides, the trial Court rejected the suit. The Appellate Court has also confirmed the same by dismissing the appeal. Aggrieved over the same, the present Second Appeal has been filed by the plaintiff.



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7. At the time of admission, this Court has framed the following substantial question of law?

“1. Whether the subsequent sale by the common vendor, when he had given a right of cart track prior to that sale of the 1st defendant by way of Ex.A1 to the plaintiff is bound to liable?

2. Has not the Courts below committed a grave error in holding that the vendor had no right to give a right of cart track, when the common vendor has given the right of cart track in his land to the plaintiff in the sale deed viz., Ex.A1?

3. Has not the Courts below committed an error that not granting the relief as per Ex.A1 the plaintiff has been granted the right of cart track?

4. Whether the Courts below correct in law in holding that the plaintiff has not proved that except the suit cart track no other cart track to reach his land, when the plaintiff has granted the right of cart track by common vendor in his land?”

8. The scope of interfering with the concurrent findings of both the Courts below is well settled and the Hon’ble Apex Court in ***Hero Vinoth (Minor) vs. Seshammal [AIR 2006 SC 2234]*** has reiterated the jurisdiction of High Court to interfere in the concurrent findings of the Lower Courts and has held in paragraph Nos.12 to 16 as follows:

*“12. We shall first deal with the question relating to jurisdiction of the High Court to interfere with the concurrent findings of fact. Reference was made by learned counsel for the appellant to **Chandra Bhan v.***



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Pamma Bai and Anr. (2002 (9) SCC 565) Sakahhari Parwatrao Karahale and Anr. v. Bhimashankar Parwatrao Karahale (2002 (9) SCC 608). So far as the first decision is concerned, in view of the factual findings recorded by the lower Court and the first Appellate Court it was held that interference with the concurrent findings of fact are not justified. The question related to possession and two Courts primarily considering factual position had decided the question of possession. In that background, this Court observed that jurisdiction under [section 100](#) CPC should not have been exercised. So far as the second decision is concerned, the position was almost similar and it was held that findings contrary to concurrent findings of lower Courts and having no basis either in pleadings, issues framed or in questions actually adjudicated upon by any of the lower Courts cannot be sustained. That decision also does not help the appellant in any manner as the factual scenario is totally different in the present case.

13. Though as rightly contended by learned counsel for the appellant the scope for interference with concurrent findings of fact while exercising jurisdiction under [Section 100](#) CPC is very limited, and re-appreciation of evidence is not permissible where the trial Court and/or the first Appellate Court misdirected themselves in appreciating the question of law or placed the onus on the wrong party certainly there is a scope for interference under [Section 100](#) CPC after formulating a substantial question of law.

14. As was noted in ***Yadarao Dajiba Shrawane (dead) by Lrs. v. Nanilal Harakchand Shah (dead) and Ors. (2002 (6) SCC 404)*** if the judgments of the trial Court and the first Appellate Court are based on mis-interpretation of the documentary evidence or consideration of inadmissible evidence or ignoring material evidence or on a finding of fact has ignored



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admissions or concession made by witnesses or parties, the High Court can interfere in appeal.

*15. In **Neelakantan and Ors. v. Mallika Begum (2002 (2) SCC 440)** it was held that findings of fact recorded must be set aside where the finding has no basis in any legal evidence on record or is based on a misreading of evidence or suffers from any legal infirmity which materially prejudices the case of one of the parties. (See: Krishna Mohan Kul alias **Nani Charan Kul and Another v. Pratima Maity and others [(2004) 9 SCC 468]**).*

*16. It is now well settled that an inference of fact from a document is a question of fact. But the legal effect of the terms or a term of a document is a question of law. Construction of a document involving the application of a principle of law, is a question of law. Therefore, when there is a misconstruction of a document or wrong application of a principle of law while interpreting a document, it is open to interference under **Section 100 CPC**. If a document creating an easement by grant is construed as an 'easement of necessity' thereby materially affecting the decision in the case, certainly it gives rise to a substantial question of law."*

9. In this case, both the Courts have rendered its concurrent findings after holding and admitting the recitals in Ex.A1-Sale deed dated 18.02.1987 which reads that the plaintiff is entitled to use the land of the defendants' vendor to reach his land. The recitals in Ex.A1-Sale deed dated 18.02.1987 reads that, the vendor of the plaintiff namely Mariappan and



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Minor Veriappan were in possession and enjoyment of their ancestral property to the extent of 2.46 acres in the total extent of 7.29 acres in Survey No.189/1A in Poyyapatti Village, Harur Sub Registration, Dharmapuri District and they have come forward to sell 1.20 acres of land which is bounded on the North side of Mariappan's land, East side of Maran's Land, South side of Kannu @ Perumal's land and West side of P.Mariappan's land. In the Schedule of property, it is further stated that to reach the land purchased by the plaintiff, he can use the customary North South cart track running from the Northern side of the vendor's land.

10. The case of the plaintiff is that she was using this cart track for the past 40 years thereby, she was also having the right of easementary by prescription. Even though both the Courts have accepted the recital and the right granted under the Sale deed, dated 18.02.1987 by the vendors of the plaintiff and defendants, after accepting the right of using the cart track granted under Ex.A1-Sale deed dated 18.02.1987, both the Courts have considered the evidence placed on record, with regard to the existence of cart track. It has been recorded that originally two Advocate Commissions were issued for noting down the physical features more particularly, physical features of the cart track, as claimed by the parties. The first



Advocate Commissioner has filed his Report stating that there is a cart track running from North to South and hence the land of the plaintiff was clearly visible. Subsequently, the second Advocate Commissioner has filed his Report and it has been recorded that this cart track, which was in existence has 15' feet width and 100' feet length and it starts from the road on the Northern side of the Plaintiff's land and also on the land of the plaintiff.

11. By relying on the boundaries mentioned in the Advocate Commissioners' Reports, it has been held that there is inconsistency in the Reports while describing the boundaries of the suit cart track. Further, both the Courts below have held that the plaintiff has claimed her right based on easementary by necessity and prescription, whereas, no evidence was adduced in support of the statement.

12. On a careful perusal of the pleadings and the rough plan attached with the plaint it only shows that the plaintiff has not properly described the cart track in her plaint. However, in Ex.A1-Sale deed dated 18.02.1987, there is a categorical grant issued in favour of the plaintiff which provides her right to use the cart track. It also shows that this cart track is being used not only for the plaintiff but also for the plaintiff's vendor. It was also



mentioned that it is a customary cart track, which means, that it was in use for several decades.

13. Section 8 of the Easements Act states that an easement may be imposed by anyone in the circumstances and to the extent, to which the servient owner may transfer his interest in the heritage on which liability to be imposed. Section 9 deals with the power of the servient owner to impose any easement on the servient heritage but that imposition shall not be lessening the utility of any existing easement. For better appreciation Section 8 and 9 of the Easements Act are extracted below:

“Section 8 Who may impose easements:- An easement may be imposed by any one in the circumstances, and to the extent, in and to which he may transfer his interest in the heritage on which the liability is to be imposed.

Section 9 Servient owners:- Subject to the provisions of section 8, a servient owner may impose on the servient heritage any easement that does not lessen the utility of the existing easement. But he cannot, without the consent of the dominant owner, impose an easement on the servient heritage which would lessen such utility.”



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14. The plaintiff herein has pleaded the easement of grant in her pleadings and also stated that based on this grant, she was using the cart track for nearly 40 years. The defendants who have purchased the lands subsequent to the plaintiff cannot deny the already existing easement of grant imposed by the first defendant's vendor on the plaintiff. Section 9 of the Easements Act declares that once the easement of grant is created in favour of dominant owner, the servient owner is not entitled to withdraw the same without the consent of the dominant owner.

15. The recitals in Ex.A1-Sale deed executed in favour of the plaintiff only shows that the intention of the vendor is to create easement by grant not an easement by necessity. When considering the similar circumstances, the Hon'ble Apex Court in ***Hero Vinoth (Minor) vs Seshammal*** case cited supra has held that easement by grant may be expressed or even by necessary implications. In either case, it will not amount to an easement of necessity under Section 13 of the Indian Easements Act, 1882. Similarly, the legal implications of Section 13 or Section 41 will not applicable to the easement by grant. In paragraph Nos.28 and 29 it has been observed as follows:

“28. The question whether an easement is one



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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 any condition, that permanency in user must be recognized and the servient tenement will be recognized and the servient tenement will be permanently burdened with that disability. Such a right does not arise under the legal implication of [Section 13](#) nor is it extinguished by the statutory provision under [Section 41](#) of the Act which is applicable only to easement of necessity arising under [Section 13](#).

29. An easement by grant does not get extinguished under [Section 41](#) of the Act which relates to an easement of necessity. An easement of necessity is one which is not merely necessary for the reasonable



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enjoyment of the dominant tenement, but one where dominant tenement cannot be used at all without the easement. The burden of the servient owner in such a case is not on the basis of any concession or grant made by him for consideration or otherwise, but it is by way of a legal obligation enabling the dominant owner to use his land. It is limited to the barest necessity however inconvenient it is irrespective of the question whether a better access could be given by the servient owner or not. When an alternate access becomes available, the legal necessity of burdening the servient owner ceases and the easement of necessity by implication of law is legally withdrawn or extinguished as statutorily recognized in [Section 41](#). Such an easement will last only as long as the absolute necessity exists. Such a legal extinction cannot apply to an acquisition by grant and [Section 41](#) is not applicable in such case.”

16. This Court in ***Koshe vs. A.Natarajan [2011 MWN 374]*** has considered the case of easement by grant has followed the Judgment of the Hon’ble Apex Court in ***Hero Vinoth vs. Seshammal*** Judgment cited supra and also two other Judgments of this Court has held that the scope of easement of grant shall be determined by the terms of grant between the parties alone. It is also further held that this grant may also depend upon the absolute necessity to enjoy the dominant heritage. An easement by grant is a matter of contract between the parties and the same is governed by the terms of grant and not by anything else. In paragraph No.12 which reads as follows:



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“12. Further, in the Judgement reported in 1999 (3) L.W. 526 (*M.Singamma Reddiar v. S.Eramallu Gounder*), the same principle was reiterated and in the Judgement reported in 2006 (5) CTC, 573 (*Ponnan & Others v. Peraman & another*), this Court has held as follows:

" It has to be pointed out that 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 by anything else. Easement of necessity and quasi-easement are dealt with in Section 13 of the Act. The grant may be expressed 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. Anyhow the scope of the grant could be determined by the terms of the grant between the parties alone. "

17. In this case, having received the easement of grant from his vendors, the plaintiff had used the land for almost 40 years. The only defence taken by the defendants' is that there is no cart track. However, the facts proven, shows that the only way to reach the plaintiff's land is the cart



track granted under Ex.A1-Sale deed. This is also confirmed by the Advocate Commissioners in the two Reports. Even though, the plaintiff has not properly described in the rough plan attached with the plaint to show the exact location of the cart track, she had succeeded in establishing the existence of cart track by way of Advocate Commissioner's report. Having accepted the fact that there is a cart track, even though, it is not a proper cart track i.e., the cart track is filled with rocks and stones, the findings of the Courts below is misconceived. In many places in the Village, having a rocky terrain, people used to commute only in such rocky terrain, which is uncultivable portion and used as a cart track. Both the Courts have misread the Advocate Commissioners Report and also based on improper description of the customary cart track in the rough plan filed by the plaintiff.

18. This Court is of the view that both the Courts ought to have moulded the relief, since there is categorical easement by grant in Ex.A1-Sale deed and there is no denial of the fact that the vendors of the first defendant even prior to selling his land in favour of the first defendant has granted right of using the customary cart track, which is running in the then unsold portion, on the North South direction, which is running from the Northern side road to the plaintiffs land. The first Advocate Commissioner



has clearly indicated that the existing cart track was damaged by the defendants with a view to prevent the plaintiff from using the same. It is also an admitted case that the contempt proceedings were initiated against him and there is a categorical evidence that on the Western corner of the first defendant's land, the cart track is running on the North South direction at the end of plaintiff's land. That being so, both the Courts have failed to consider this material evidence regarding destruction of the existing customary cart track. Further their findings suffer from misinterpretation of the documentary evidence i.e., Ex.A1-Sale deed and by ignoring the admission of the second defendant. Hence, this Court is inclined to modify the relief claimed to the extent that the plaintiff is entitled to use the cart track as described in the First Advocate Commissioner's Report and Rough Sketch marked as Ex.C1 and Ex.C2.

19. The Lower Appellate Court had rejecting the Commissioner Report No.2, based on the fact that, it contains measurements of cart track. However, the Court has not rejected the report of the Advocate Commissioner regarding the existence of cart track. In view of the discussions made above, the plaintiff is entitled for declaration that she is entitled to use the cart track as stated in Ex.C1 and Ex.C2 of Commissioner



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Report No.1 and the Report shall form part of the Decree and Judgment.

Accordingly, the substantial questions of law are answered in favour of the plaintiff. Ex.C1 and Ex.C2 shall form part of the Decree and Judgment.

20. In the result, the Second Appeal is partly allowed. The Judgment and Decree dated 13.09.2012 passed in A.S.No. 21 of 2012 on the file of the Subordinate Court, Harur, confirming the Judgment and Decree dated 30.01.2012 passed in O.S. No. 278 of 2004 on the file of the District Munsif, Harur is hereby set aside. The relief claimed by the plaintiff is granted to the extent that the plaintiff is entitled for declaration that she is entitled to use the cart track as described in the Advocate Commissioner's Report and Rough Sketch marked as Ex.C1 and Ex.C2. Consequently, the plaintiff is also entitled for permanent injunction as prayed in the suit for the suit cart track shown in the Advocate Commissioners Report marked as Ex.C1 and Ex.C2. No order as to costs. Consequently, the connected miscellaneous petition stands closed.

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Index : Yes / No

Speaking Order : Yes/No

Neutral Citation Case : Yes/No



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To:

1. The Subordinate Judge,
Harur.
2. The District Munsif,
Harur.
3. The Section Officer,
VR Section,
High Court of Madras.



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K.RAJASEKAR,J.,

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