



S.A.No.467 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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Judgment Reserved on
27.03.2024

Judgment Pronounced on
18.04.2024

CORAM

THE HONOURABLE MR. JUSTICE P.B.BALAJI

S.A.No.467 of 2018
and C.M.P.No.12604 of 2018

1.Selvakumar
2.M.Kumarasamy
3.M.Palanisamy

.. Appellants

Vs.

A.Murthy

.. Respondent

PRAYER: The Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 23.02.2018 passed in A.S.No.54 of 2017 on the file of the Sub Court, Sathyamangalam, reversing the judgment and decree dated 14.11.2017 made in O.S.No.88 of 2016 on the file of the District Munsif Court, Sathyamangalam.

For Appellants : Mr.N.Manokaran

For Respondent : Mr.M.Roshan Atiq

JUDGMENT



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The plaintiffs are the appellants, aggrieved by the reversal findings rendered by the First Appellate Court, dismissing the suit filed for declaration, mandatory injunction and permanent injunction which was originally decreed by the Trial Court.

2.The parties are described as per their litigative status before the Trial Court.

3.The material facts that are necessary for deciding the above Second Appeal are as follows:

The case of the plaintiffs is that the defendant is the owner of the adjacent land belonging to the plaintiffs. The grandfather of the 1st plaintiff by name Sengaliappa Gounder and his brothers Kaliappa Gounder and Marappa Gounder had jointly purchased properties in and by a sale deed registered as document No.424 of 1981. In the year 2009, the sons of the Sengaliappa Gounder and sons of Marappa Gounder and others, have affected a partition amongst themselves. The suit property was allotted to Chinnaiyan, Kumarasamy and Palanisamy and properties in the nearby areas were allotted to Kaliappa Gounder. The 1st plaintiff is the son of Chinnaiyan, that is the grandson of Sengaliappa Gounder and



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the 2nd and 3rd plaintiffs are the sons of Marappa Gounder, who is none else than the brother of Sengaliappa Gounder. The plaintiffs' further case is that the father of the 1st plaintiff has executed a release deed in favour of his son, namely the 1st plaintiff and the plaintiffs have been in enjoyment of the property, right from 1981 onwards. The specific case of the plaintiffs is that, a suit cart track was existing even prior to the date of purchase of the suit property by the grandfather of the 1st plaintiff in the year 1981. According to the plaintiffs, the defendant has no exclusive right over the suit cart track running East West direction with a breadth of 16 ft., and length of more than 250 ft., starting from Marampalayam Road and reaching the plaintiffs' land. The suit was filed with the allegation that the defendant, with an intention to swallow the common suit cart track for himself, put up a gate at the entrance of the suit cart track and thereby prevented the plaintiffs from using the same. Claiming that the plaintiffs had an easement by grant and the defendant had no right to obstruct the same, the suit came to be filed.

4.The defendant filed a written statement denying the existence of the suit cart track for the enjoyment of the plaintiffs. According to the defendant, the suit cart track has been laid by the defendant for his



exclusive use. Further, it is the case of the defendant that the suit cart track which was existing in terms of the registered documents had been abandoned by the plaintiffs and the defendant has been continuously and peacefully cultivating the said cart track lands as well, along with his adjoining lands in the southern side. According to the defendant, the plaintiffs' easementary right over the suit cart track stood extinguished and the defendant therefore prays for dismissal of the suit.

5.The Trial Court accepting the plaintiffs case and decreed the suit. However, on appeal by the defendant, the First Appellate Court reversed the findings of the Trial Court and allowed the appeal, thereby dismissed the suit. Aggrieved by the reversal findings rendered by the First Appellate Court, the plaintiffs are before this court by way of the present Second Appeal.

6.On 25.07.2018, the above Second Appeal has been admitted by this Court, on the following four substantial questions of law:

“1. When the plaintiffs lands are land locked, are they not entitled to have right of free ingress and egress to their lands under the easement of implied grant irrespective of the ambiguities in their title deeds?

2. When the lands of the plaintiffs and the defendant were owned and held by a single owner,



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whether the denial of easement by grant is contrary to law of easement, which enjoins the existence of two tenements ?

3. Whether the First Appellate Court has committed an error of law in receiving Ex.B.1 in the appeal stage in violation of the mandate of Order XLI Rules 27 and 28 of the Civil Procedure Code ? And

4. Whether the conclusion of the First Appellate Court in relying upon Ex.B.1 is perverse, particularly when the defendant has neither disputed nor denied the existing physical features noted in Ex.C.1 to Ex.C.4? ”

7.I have heard Mr.N.Manokaran, learned counsel for the appellants and Mr.M.Roshan Atiq, learned counsel for the respondent. I have gone through the pleadings, oral and documentary evidence adduced by the parties before the Trial Court as well as the judgements of the Trail Court and the First Appellate Court.

8.The learned counsel for the appellant, Mr.N.Manokaran, would take me through the documents in Exs.A1, A4 and A5 which clearly spell out the suit cart track. He would also draw my attention to the plaint plan and the Advocate Commissioner's report. He would further state that the Commissioner's report and plan clearly falsified the plan put forth by the



defendant along with the written statement. The learned counsel for the appellant would also submit that once grant is made, there is no question of it getting extinguished under section 47 of the Indian Easements Act, 1882 and that the Trial Court has rightly appreciated the evidence adduced by the parties and the legal position and decreed the suit. However, it is contended by the learned counsel for the appellants that the First Appellate Court has erroneously overturned the well considered findings of the Trial Court, on misreading of oral and documentary evidence available on record. The learned counsel would further state that the existence of an alternate access would not in any way extinguish the grant in favour of the appellants/plaintiffs and he would therefore pray for the judgement of the First Appellate Court being set aside and judgement of the Trial Court being restored.

9.Per contra, Mr.M.Roshan Atiq, learned counsel for the respondent/ defendant would submit that the plaintiffs have not been able to locate the cart track. He would also refer to the oral evidence of P.W.2 and P.W.3 and also refer to the Commissioner's report and contend that the plaintiffs have miserably failed to establish that the suit cart track is the cart track that is specified in Exs.A1, A4 and A5. The learned counsel would further state that the Commissioner has noted two palm trees,



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obstructing the entrance of the property of the plaintiffs where the alleged cart track meets the plaintiffs' property and he would therefore state that the suit cart track could not have been the cart track mentioned in the registered documents. He would place reliance on the evidence of P.W.2 and P.W.3 and contend that the local villagers have categorically admitted that the plaintiffs have been using an alternate cart track and therefore, the First Appellate Court has rightly accepted the existence of the cart track suggested by the defendant along with the written statement and no interference was therefore warranted.

10.I have carefully considered the rival submissions advanced by the counsel on either side.

11.Admittedly there is a cart track which has been set apart in Exs.A1, A4 and A5. According to the plaintiffs, the said cart track is running across the defendant's property in East to West direction and dividing the lands covered under Exs.A4 and A5 documents. However, according to the defendant, the suit cart track is not cutting across the defendant's land and it is situated to the South of the 2nd and 3rd plaintiffs' house. It is the further case of the defendant that an iron gate has been put up several years back and the same not of recent origin as claimed by the



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plaintiffs. The defendant also contends that the registered documents also do not mention the length and breadth of the cart track and therefore, the plaintiffs cannot be entitled to a grant in the absence of specific measurements.

12.The learned Advocate Commissioner has inspected the site and filed a report and the existence of the suit cart track has been clearly shown by the Advocate Commissioner in his report. However, the Advocate Commissioner has shown another alternate pathway available to the plaintiffs. The Advocate Commissioner has also specifically mentioned that the existing cart track which is claimed by the plaintiffs is of a width of about 12 to 16 ft., and of length of between 200 to 250 ft. The Advocate Commissioner has also noted that the iron gate has been fixed recently. The defendant, though chose to file an objection to the commissioner's report, has not disputed the measurements of the cart track as set out by the Commissioner. The Advocate Commissioner's report clearly corroborates with the suit cart track as projected by the plaintiffs in the plaint and as shown by the plaint plan.

13.The Trial Court has rightly discussed the contentious issues and noticing that the registered documents did not contain measurements of



the suit cart track, held the existence of the suit cart track had to be made out only from preponderance of probabilities. The Trial Court has also rightly found that once there is a grant of right to use the suit cart track by way of registered documents, the same cannot be extinguished. The Trial Court has also rightly discussed the cart track suggested by the defendant to be the suit cart track and held that if really the cart track as shown by the defendant was the suit cart track, then the documents under which the defendant's mother sold the property in Ex.A5 would have a mention of the said cart track. Admittedly, in Ex. A5, there is no mention of the alleged cart track as sought to be contented by the defendant.

14.Further, the Trial Court has also rightly held that the suit cart track leading upto the plaintiffs lands was the suit cart track and it was being used by the plaintiffs for the purposes of ingress and egress and only recently the iron gate has been installed, thereby preventing the plaintiffs from accessing the suit cart track. The reliance placed on the evidence of P.W.2 and P.W.3, regarding the plaintiffs using an alternate cart track would have no bearing on the merits of the plaintiffs claim because, admittedly, when the plaintiffs came to court, the defendant had put a gate and locked it, thereby preventing the plaintiffs from accessing the suit cart track. In such circumstances, the witnesses have stated that plaintiffs are using an alternate pathway to reach their lands. This would



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not in any way amount to the plaintiffs waving the grant or as rightly contended by the learned counsel for appellants, extinguishment of a grant under Section 47 of the Easement Act would not come into play. However, the First Appellate Court, without a proper appreciation of the evidence available on record and also the report of the Advocate Commissioner, has interfered with the well merited findings of the Trial Court, based on surmises and conjunctures. The reasoning of the First Appellate Court is without any basis whatsoever, especially, without adverting to the oral and documentary evidence available on record, especially, Ex.A5. The First Appellate Court exceeded its jurisdiction in holding that the plaintiffs are entitled to use the alternate pathway suggested by the defendant, a new cart track which was neither the case of the plaintiffs nor the case of the defendant.

15. With regard to the contention of the learned counsel for the defendant that the existence of bushes in the suit cart track and also the palm trees at the entrance of the plaintiffs property at the place where the suit cart track meets the plaintiffs' property only going to show that there was no suit cart track, I do not find the same in any manner taking away the grant of easement in favour of the plaintiffs. Admittedly the defendant has put up a gate and denied access to the plaintiffs and therefore, when



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the Advocate Commissioner visited, wild bushes had grown in the suit cart track and that by itself cannot be a ground to hold that the said suit cart track was not being used by the plaintiffs. Moreover, even the existence of the palm trees is only at the entrance of the plaintiffs property and it is for the plaintiffs to manage the entry into their property and this is again not a ground to hold that the easement by way of grant should be denied to the plaintiffs. The Trial Court has rightly discussed the pleadings, oral and documentary evidence and come to the most probable conclusion with regard to the lay of the suit cart track. Unfortunately, the First Appellate Court for extraneous reasons, has suggested a totally different cart track which was neither pleaded by the defendant nor set up by the plaintiffs.

16.The case not pleaded by both the parties cannot form the basis of a finding and the same leading to a judgement and necessarily I am constrained to interfere with the judgement of the First Appellate Court. In fine, the substantial questions of law are answered in favour of the appellants.

17.In the result, the Second Appeal is allowed and the judgment and decree of the First Appellate Court dated 23.02.2018 in A.S.No.54 of



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2017 is set aside and the judgment and decree of the Trial Court dated 14.11.2017 in O.S.No.88 of 2016 is restored to file. There shall be no order as to costs. Consequently, connected Civil Miscellaneous Petition is closed.

18.04.2024

Index : Yes/No
Speaking Order/Non-Speaking Order
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P.B.BALAJI., J.

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To

1. The Sub Court, Sathyamangalam.
2. The District Munsif Court, Sathyamangalam.
3. The Section Officer, V.R.Section, High Court, Madras.

Pre-delivery judgment made in

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