



S.A(MD)No.117 of 2012

WEB COPY **BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT**

DATED: 26.04.2024

CORAM:

THE HONOURABLE MR.JUSTICE S.SOUNTHAR

S.A(MD)No.117 of 2012

1.Akkammal

2.Balamani

3.Ranjitham

4.S.Balasubramani

...Appellants

-Vs-

Velusamy

... Respondent

PRAYER: Second Appeal is filed under Section 100 of the Code of Civil Procedure, to set aside the judgment and decree dated 30.10.2010 made in A.S.No.466 of 2004 on the file of the Chief Judicial Magistrate Court, Dindigul, confirming the judgment and decree dated 21.07.2004 made in O.S.No.257 of 2000 on the file of the District Munsif Cum Judicial Magistrate Court, Vendasandur.

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For Appellants : Mr.S.Chandrasekar
for M/s.Sarvabhauman Associates

For Respondent : Mr.T.Antony Arulraj

JUDGMENT

The defendants 2 to 5 are appellants. The respondent herein filed a suit for declaration of his right of cart track over suit item-II so as to reach suit item-I and for consequential injunction restraining the appellants from interfering with his right of user and also for injunction from restraining the appellants from obliterating the cart track. The suit was decreed by the trial Court and findings of the trial Court were affirmed by the first appellate Court. Aggrieved by the concurrent findings, the defendants 2 to 5 have come by way of this second appeal. The first defendant, who is the husband of first appellant/second defendant and the father of appellants 2 to 4/defendants 3 to 5, died pending first appeal and hence, this second appeal has been preferred only by the defendants 2 to 5.



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2. According to the plaintiff/respondent, the suit item- I was allotted to the share of his father and his grandfather Ramasamy Naickar in the family partition dated 27.11.1956 between Ramasamy Naickar and his sons. The suit item-II was allotted to the share of deceased first defendant Gopalsamy Naickar. The plaintiff's grandfather Ramasamy Naickar was given right of easement to use cart track, which lies on the northern extremity of the lands in Survey Nos.23 and 24 allotted to the share of first defendant, to reach the first item of the suit property. Subsequently, the said Ramasamy Naickar executed a settlement deed on 24.12.1959 settling suit item-I along with easementary right over the suit Item-II in favour of plaintiff. From the date of settlement, the plaintiff has been using the suit item-II as a cart track to reach suit item-I. The defendants attempted to obliterate the cart track and annex the same along with their property on the southern side and therefore, the plaintiff was constrained to file a suit for declaration and injunction as prayed for.

3. The defendants filed a written statement admitting the allotment of first item of the suit property to Ramasamy Naickar. However, it was pleaded by the defendants that the recital in the partition deed dated 27.11.1956 and subsequent



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settlement deed in favour of the plaintiff dated 24.12.1959 as if suit item-II was cart track to access suit Item-I was included by inadvertence. It was also pleaded by the defendants that the plaintiff was having alternative cart track to access suit item-I and he was not entitled to declaration as prayed for. It was also claimed by the defendants that from the date of 1956 partition, the defendants have been enjoying the suit item-II along with property in the southern side without interference from anybody. They also claimed that the plaintiff never enjoyed the suit item-II as cart track to reach suit item-I. On these pleadings, the defendants sought for dismissal of the suit.

4.Before the trial Court, the plaintiff was examined as P.W.1 and yet another witness was examined as P.W.2 and 18 documents were marked on behalf of the plaintiff as Ex.A1 to Ex.A18. The fifth defendant was examined as D.W.1 and one another witness was examined as D.W.2 and seven documents were marked as Ex.B1 to Ex.B7 on behalf of the defendants. The Advocate Commissioner's Report and Plan were marked as Ex.C1 and Ex.C2.



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5.The trial Court, on appreciation of oral and documentary evidence available on record, came to the conclusion that the plaintiff was entitled to declaration and injunction as prayed for and decreed the suit. Aggrieved by the same, the defendants preferred an appeal in A.S.No.466 of 2004, on the file of the Chief Judicial Magistrate, Dindigul. The first appellate Court affirmed the findings of the trial Court. Aggrieved by the concurrent findings, the defendants 2 to 5 have preferred this second appeal.

6.At the time of admission, this Court formulated the following substantial question of law, by order, dated 20.07.2012:-

“When the plaintiff has sought a lesser relief of easementary right, whether the approach of the trial Court in granting a larger relief of common right of pathway and consequent affirmation of the same by the appellate Court, without defining the nature of right to which the plaintiff is entitled to, is correct in law?”

7.The learned counsel for the appellants submitted that the trial Court without understanding the pleadings of the parties framed a wrong issue as if the



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plaintiff was claiming common right over the suit pathway and decreed the suit.

The learned counsel further submitted that the failure of the trial Court to frame proper issues with regard to the plea of easementary right by the plaintiff vitiates the findings. He also submitted that the physical features noted by the Advocate Commissioner in his report regarding existence of vegetation in the suit item-II would advance the plea of extinguishment of easement raised by the defendants and the Courts below overlooked the said material piece of evidence.

8.A reading of the pleadings would suggest that the respondent/plaintiff came to the Court with the plea of easement by grant. A perusal of Ex.A1-partition deed would suggest that the plaintiff's grandfather Ramasamy Naickar was allotted 'A' schedule property in the said partition. The suit item-I was allotted as item No.10 in 'A' schedule to Ex.A1-partition deed. In the very same document, there is a clear recital giving easementary right to the owner of 'A' schedule property to use cart track which lies on the northern extremity of Survey Nos.23 and 24, which were allotted to the first defendant under 'E' schedule to the partition deed. The recital regarding easement by grant in respect of suit item-II is reiterated in the settlement deed executed by the said Ramasamy



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Naickar in favour of plaintiff under Ex.A2. The recital regarding easmentary right granted to the Ramasamy Naickar has not been denied by the defendants.

9.On the contrary, it was pleaded by the defendants that the recitals in the partition deed as well as settlement deed relied on by the plaintiff were included inadvertently and the plaintiff never enjoyed the suit item-II as a cart track to reach the suit Item-I. Therefore, in effect the defendants pleaded extinguishment of easement by abandonment. The Advocate Commissioner visited the property filed his report and plan and the same have been marked as Ex.C1 and Ex.C2. A perusal of the same would suggest that there is a cart track on the northern extremity of Survey Nos.23/1 and 24/2 to enable the owner of the property in Survey No.24/1, which lies on the western side to reach the same. The cart track has been described as 'ABCD' by the Advocate Commissioner in his report. The Advocate Commissioner noted the existence of fence on the northern side of the cart track and he also noted existence of the north-south fence on point 'D' dividing the property of the plaintiff, which lies on the west with the property of the defendants which lies on the east. Therefore, it is clear that the north-south fence between the property of the plaintiff and defendants only starts from the



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southern point of the northern cart track. If the entire property including the cart track has been in continuous possession and enjoyment of the defendants as contended by them, the north-south fence dividing the property of the plaintiff and defendants should start from the northern point of the cart track, namely, point 'C' in the Commissioner's Plan. Therefore, the physical features noted by the Advocate Commissioner proved the existence of cart track as pleaded by the plaintiff in the northern extremity of defendants' land.

10.The learned counsel for the appellants, by pointing out that the Advocate Commissioner noted growth of vegetation in the cart track and resultantly, narrowing of the breadth of the cart track, submitted that the plaintiff abandoned the cart track and therefore, the vegetation are available in the cart track. Merely because, there are vegetation and the breadth of the cart track is narrowed down in some point due to the growth of vegetation, we cannot come to the conclusion that the plaintiff abandoned the right of user available to him in respect of the cart track and defendants enjoyed the cart track along with their property to the exclusion of the plaintiff for more than the statutory period. As pointed out earlier, the north-south fence dividing the property of the plaintiff and defendants



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starts only from the southern point of the cart track to facilitate the plaintiff to use cart track to reach his property on the eastern side. In such circumstances, the plea raised by the defendants regarding extinguishment of easement, cannot be accepted.

11.Though it was argued by the appellants/defendants that the Advocate Commissioner failed to note the existence of alternate pathway to the property of the plaintiff, existence of alternate pathway or cart track, will not disentitle the plaintiff from claiming the right available to him by way of grant under the document. In such circumstances, I do not find anything to interfere with the conclusion reached by the Courts below that the plaintiff proved the existence of cart track and his entitlement to use the same to reach his property on the eastern side by virtue of grant under Ex.A1 and Ex.A2.

12. Though the trial Court framed the issue as if the plaintiff was claiming a common right over the suit item-II overlooking the plea of easement by grant raised by him, the first appellate Court rightly framed the point for determination regarding the easementary right based on the grant under the document and came



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to the factual conclusion that the plaintiff was entitled to easementary right by grant. Therefore, the question of law framed at the time of admission is answered against the appellants and in favour of the respondent.

13.In view of the answer given to the question of law framed at the time of admission, the Second Appeal is dismissed. No costs.

26.04.2024

NCC : Yes / No
Index : Yes / No
Internet : Yes / No
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To

- 1.The Chief Judicial Magistrate,
Dindigul.
- 2.The District Munsif Cum Judicial Magistrate,
Vedasandur.
- 3.The Record Keeper,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.



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