
(2015) 11 MAD CK 0122

In the Madras High Court

Case No : Second Appeal No. 982 of 1999

Palaniappap Gounder and Others

APPELLANT

Vs

Singaravelan and Others

RESPONDENT

Date of Decision : 06-11-2015

Acts Referred:

Transfer of Property Act, 1882 — Section 11

Citation : (2015) 11 MAD CK 0122

Hon'ble Judges : Pushpa Sathyanarayana, J.

Bench : Single Bench

Advocate : M. Rajaraman, for the Appellant; T. Murugamanickam, for the Respondent

Final Decision : Dismissed

Judgement

Pushpa Sathyanarayana, J.—Aggrieved by the unanimous decisions of the courts below, the unsuccessful defendants 1 to 4 have filed the instant Second Appeal.

2. The suit was filed by the plaintiffs for declaration that the suit A, B, C cart track belonged to them and for injunction restraining the defendants from obstructing the usage of the said cart track by the plaintiffs and for removal of the obstructions over the same.

3. One Palaniappa Gounder, Arumugam Gounder and Deivanai Ammal are brothers and sisters. Deivanai Ammal had 3 sons. Palaniappa Gounder is the first defendant and his wife is the second defendant while defendants 3 to 5 are their children. The plaintiffs are the sons of Arumugam Gounder. The said Deivanai Ammal had executed three settlement deeds on 23.04.1973 under Exs. A.1 and A.2 as well as B.2 in favour of the plaintiffs 1 and 2 and the defendants 3 to 5 respectively. The suit cart track is passing through the land allotted to the defendants 3 to 5 only through which the plaintiffs can reach their respective lands. Other than the suit cart track, there is no other pathway for the plaintiffs to reach their lands. While so, the defendants had obliterated the suit cart track

by converting the same into a drying yard and for stacking agricultural produce resulting in the suit.

4. The defendants contested the suit denying the rights of the plaintiffs as alleged in the plaint. While admitting the execution of the settlement deeds in favour of the plaintiffs, the defendants contended that the plaintiffs are not entitled for any right of easement by grant. According to the defendants, in the settlement deeds executed by Deivanai Ammal, there was no mention about the cart track and that the plaintiffs had been using only the pathway from point B on the defendants' land. The defendants also contended that the plaintiffs never used any cart track as alleged and that they have no objection for the plaintiffs using the pathway.

5. The trial Court/Principal District Munsif, Bhavani, before whom the parties adduced evidence and marked documents, finding that the plaintiffs have proved their possession, decreed the suit O.S. No. 262 of 1988 as prayed for by judgment and decree dated 21.10.1997. On appeal in A.S. No. 80 of 1998, the Lower Appellate Court/learned Subordinate Judge, Bhavani, confirmed the findings of the trial Court by judgment and decree dated 04.01.1999. Hence, the present Second Appeal by the defendants.

6. At the time of admission of this Second Appeal, the following substantial questions of law were formulated by this Court for consideration:--

"1. On the facts and circumstances of the case, whether the respondents had pleaded and proved the plea of easement of cart track in the lands of the appellants on the basis of Ex. A.1 and A.2 without placing the parent documents of Exs. A.1 and A.2?

2. On the facts and circumstances of the case, whether the Courts below are right in finding that there existing a cart track on the date of filing of the suit and that the appellants had obliterated the said track just before the filing of the suit, on the basis of Ex. C.1 and C.2 and on the basis of oral evidence of P.W.3 which was contra to the evidence of P.W.1 and P.W.2?

3. On the facts and circumstances of the case, whether the Courts below are right in finding that there was a cart track and that there was obliteration of the said cart track, on the basis of the ignorance of the same by P.W.1 and P.W.2?"

7. Heard Mr. M. Rajaraman, learned counsel appearing for the appellants/defendants and Mr. T. Murugamanickam, learned counsel for the respondents/plaintiffs and perused the records.

8. From the materials available on record, it is seen that the suit cart track is proceeding from east - west road towards south -north to a length of 530 feet and proceeds towards east for about 80 feet. The plaintiffs 1 and 2 are claiming right over the suit cart track based on Ex. A.1 and A.2 respectively. The schedule to the document Ex. A.1 settlement deed executed by Deivanai Ammal in favour of the first plaintiff on 23.04.1973 is described as follows:

The schedule to the document Ex. B.2 settlement deed 23.04.1973 executed by Deivanai Ammal in favour of the defendants reads as follows :

Therefore, in the above 2 documents, it has been clearly mentioned by the settler that the suit cart track is common to the defendants as well as the plaintiffs.

9. It is the specific case of the defendants that the suit property was used only as a pathway and was never used as the cart track. According to the learned counsel for the defendants, the recitals in the above documents are only sham and never intended to be conveyed.

10. Even in Ex. B.2, the suit cart track has been referred to be owned commonly by the first plaintiff and the defendants 3 to 5. Exs. A.1, A.2 and B.2 are settlement deeds executed by Deivanai Ammal in favour of the plaintiffs, defendants and her 3 sons. In support of their case, the plaintiffs had examined one of her sons Palanisamy as P.W.3, who has specifically stated that the settlement deeds were executed in favour of the plaintiffs and defendants in the year 1973 and even on that date, there was a cart track. Even after the settlement also, the cart track had been used by parties. P.W.3 has specifically deposed that the defendants had obliterated the suit cart track. He has further stated that the contention of the defendants that there is only one pathway is available, is incorrect.

11. It is pertinent to note that the above said witness P.W.3 is one of the settlors in Exs. A.1, A.2 and B.2. He himself has categorically confirmed the existence of the suit cart track even from the date of settlement deeds. When the settlor himself has admitted the existence of the cart track which is common to all the parties, the case of the defendants is unacceptable. Besides, the defendants had not pleaded in the written statement that the cart track mentioned in the settlement deeds was sham and nominal and was never intended to be acted upon.

12. It is the specific case of the plaintiffs that the suit property was obliterated by the defendants which resulted in filing of the suit. While so, the Commissioner, who had visited the property 5 months after the filing of the suit, could not have found the cart track. Therefore, based on the report of the Commissioner, the non-existence of the cart track cannot be concluded. When the documents themselves clearly go to show that the plaintiffs and the defendants are having joint ownership over the suit cart track, the same cannot be denied by the defendants.

13. A perusal of the plaint would go to show that the plaintiffs have sought for declaration of their right over the suit ABC cart track and not right of easement. It has been categorically stated in the plaint that the suit cart track is the only way to reach their lands and there is no other way. When the plaintiffs and defendants claim their right only through the settlement deeds executed by their aunt Deivanai Ammal, both the parties have equal rights over the suit property.

14. In this regard, it would be relevant to refer to the deposition of D.W.1 - third defendant, who, admitting the rights of the plaintiffs to the suit property, had deposed to the following effect:--

15. Learned counsel appearing for the appellants contended that the respondents/plaintiffs are not entitled to any right over the suit property as the transaction under Exs. A.1 and A.2 are not valid. According to the learned counsel, the mere mentioning of the cart track in the settlement deed is not a condition but it is only a stipulation and hence, the transfer is with a restriction. He further submitted that the following ingredients have not been fulfilled in the instant case for applicability of Section 11 of the Transfer of Property Act. According to the learned counsel,

"(i) there should be a transfer of property;

(ii) an interest in the property should be created absolutely in favour of a person;

(iii) the terms of the transfer should direct that such interest shall be applied or enjoyed by the said person in a particular manner."

16. In support of such contention, learned counsel relied on the decision of the High Court of Allahabad in Bhagwat Prasad Vs. Damodar Das and Others, and the judgment rendered by the Kerala High Court in Leela Vs. Ambujakshy and Others, .

17. At this juncture, it is to be pointed out that the second portion of Section 11 of the Transfer of Property Act brings out an exception to the general rule and provides that a restriction on mode of enjoyment may be imposed for the benefit of the dominant tenement. The Section only speaks of the restrictions that are repugnant to interest created on transfer of property absolutely in favour of a person which directs that such interest shall be applied or enjoyed by the transferee in a particular manner.

18. In the case on hand, there is no such restriction but it only speaks of joint ownership over the suit cart track. Therefore, there is no condition as contemplated under Section 11 of the Transfer of Property Act like postponing the enjoyment or conditions in restraint of partition. Therefore, the contention of the learned counsel for the appellants is unacceptable as no such condition is stipulated in the settlement deeds. In view of the fact that no condition is stipulated, the judgments relied on by the learned counsel for the appellants are of no use to the case of the appellants.

19. In view of the above discussion, this Court is of the considered opinion that the plaintiffs are entitled to equal right over suit ABC cart track along with the defendants and as rightly held by the Courts below, the defendants cannot disturb the usage of cart track by the plaintiffs. The defendants also have no right to obliterate the cart track and hence, the cart track has to be restored by the defendants.

20. While affirming the findings of the learned trial Judge, the First Appellate Court has also given finding on a conscious application of mind and recorded findings supported by reasons on all issues raised by the parties. Sitting in Second Appeal, this Court can see whether the Courts below neither ignored any material evidence nor acted on no evidence.

21. At this juncture, it would be appropriate to refer to the decision of the Hon"ble Apex Court in Hero Vinoth (minor) Vs. Seshammal, wherein, after referring to the Full Bench decision of this Court in Rimmalapudi Subba Rao Vs. Noony Veeraju and Others, , Their Lordships observed in paragraph 24(iii) as follows:--

"The general rule is that High Court will not interfere with concurrent findings of the Courts below. But it is not an absolute rule. Some of the well recognized exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to "decision based on no evidence", it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."

22. Applying the above said principle to the facts of the present case, I feel that the Courts below have not ignored any material evidence or there is any wrong or infirmity in applying the law or wrongly cast the burden of proof. As such, no question of law, much less, substantial question of law arises for consideration and the questions are answered accordingly.

In view of the foregoing reasons, interference with the concurrent judgment is not warranted to upset the findings of the Courts below as no valid ground nor circumstance has been made out to disturb the same. Therefore, the Second Appeal fails and stands dismissed confirming the judgment and decree dated 21.10.1997 passed by the learned Principal District Munsif, Bhavani, in O.S. No. 262 of 1988 as affirmed by the learned Subordinate Judge, Bhavani, by judgment and decree dated 04.01.1999 passed in A.S. No. 80 of 1998. However, considering the relationship between the parties, they are directed to bear their own costs.