

THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 12.02.2015

Delivered on : 13.02.2015

CORAM

THE HONOURABLE MR. JUSTICE P.R.SHIVAKUMAR

S.A.No.180 of 2008

and

M.P.No.1/2008

Venkidusamy

.. Appellant/Plaintiff in Trial Court

-Vs-

Karupusamy

.. Respondent/Defendant in Trial Court

Prayer:- Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree in A.S.No.30/2007 dated 26.09.2007 on the file of the Principal Sub Judge, Gopichettipalayam reversing the judgment and decree made in O.S.No.33 of 1999 dated 20.03.2006 on the file of District Munsif, Sathyamangalam.

For Appellant : Mr.S.Kamadhevan

For Respondent : Mr.V.Nicholas

JUDGMENT

The plaintiff proved to be successful before the trial court but lost his case in the appeal before the lower appellate court and hence he is before this court with the present second appeal. The appellant/plaintiff filed the suit O.S.No.33/1999 on the file of Court of District Munsif, Sathyamangalam for: 1) a declaration of his easementary right by prescription and by grant to take men, cattle and carts through the suit cart-track; 2) a permanent injunction restraining the respondent/defendant from causing any obstruction to the enjoyment of the suit easementary right; and 3) cost.

2. The appellant/plaintiff Venkidusamy and the respondent/defendant Karuppusamy are brothers. Their father Rangan purchased the property measuring an extent of 8.53 acres comprised in S.F.No.392 of Chikkarasampalayam village, Sathyamangalam Taluk under a registered sale deed in the year 1959. After the said purchase, he sold the southern most part of the survey No.392 measuring an extent of 1.19 acres to the respondent/defendant under a sale deed dated 08.03.1984, a certified copy of which has been

produced as Ex.A5. The said portion sold in favour of the respondent/defendant came to be sub-divided as 392/2 and the remaining portion retained by Rangan was assigned sub division No.392/1. Subsequently, in the year 1988, Rangan settled the northern most part of S.No.391/1 measuring an extent of 2.00 acres in favour of the appellant herein/plaintiff under a registered Settlement Deed dated 22.08.1988, a certified copy of which has been produced as Ex.B1. After the death of the father Rangan, the middle portion was divided among the legal heirs of Rangan under a registered Partition Deed dated 01.08.1994, a certified copy of which has been produced as Ex.A4. As per the partition, the northern portion immediately lying on the south of the property settled on the appellant herein/plaintiff under Ex.B1 came to be allotted to the share of the appellant herein/plaintiff. Similarly, the southern portion adjoining the property sold by Rangan in favour of the respondent herein/defendant under Ex.A5-sale deed came to be allotted to the respondent herein/defendant. The middle portion was allotted jointly in favour of Pazhanal, the wife of Rangan and Lingammal, the daughter of Rangan. In the said partition deed, the properties thus allotted jointly to Pazhanal and Lingammal was shown as the 'A' schedule property, the property allotted to the appellant herein/plaintiff Venkidusamy was shown as the 'B' schedule property and the property allotted to the respondent herein/defendant Karuppusamy was shown as the 'C' schedule property.

3. Even prior to the division they had left a 16 feet passage forming the eastern part of S.No.391/1, which extended up to the southern boundary of the said survey number. Prior to the partition, the respondent herein/defendant purchased the property comprised in S.No.393/1, which situates on the south of S.No.392/2 purchased from his father under Ex.A5. The said property was purchased in two spells under two sale deeds dated 13.11.1981 and 01.06.1984, copies of which have been marked as Exs.A1 and A2. In all those sale deeds and the settlement deed, the mamool cart-track and the 16 feet cart-track provided on the eastern portion of S.No.391/1 were also referred to. The above said facts are the admitted facts and they are not disputed by the parties.

4. Contending that the entire properties comprised in S.Nos.392/1 and 392/2 had an easementary right of cart-track connecting S.No.363 (Pallam) through S.Nos.364 and 393/1; that the said cart-track was the mamool cart-track used by the parties to reach their respective portions in S.No.392/1; that the respondent/defendant wanted the appellant/plaintiff to sell his share to him, but the appellant/plaintiff did not agree for the same and that hence with a view to harass and intimidate the appellant/plaintiff, the respondent/defendant started preventing the appellant/plaintiff from using the cart-track passing through S.Nos.394 and 393/1, the appellant/plaintiff filed the above said suit O.S.No.33/1999 on the file of the trial court for the reliefs indicated supra. The suit cart-track has been shown as ABCDEFGHIJK

in the rough plan annexed to the plaint.

5. The claim of the appellant/plaintiff was resisted by the respondent/defendant contending that there was no mamool cart-track connecting the pallam and S.No.393/1 before he purchased a stripe of land in S.No.364 for use as cart-track to reach his land in S.No.393/2; that the land comprised S.No.392/1 had an access through the east-west cart-track running in the neighbouring field lying on the north of the share of appellant/plaintiff; that the same was the mamool cart-track to reach the shares of the parties in S.Nos.392/1 and 392/2; that after the appellant/plaintiff purchased the property comprised in S.No.393/1, which lies on the south of S.No.392/2, he purchased a stripe of land in S.No.364 to have a direct access to his property in S.No.393/1; that from S.No.393/1 he had extended the cart-track to get it connected with the east-west cart-track provided on the eastern portion of the land comprised in S.No.392/1; that the said portion of the cart-track was formed by him for his exclusive use; that neither the appellant/ plaintiff nor the mother and sister of the parties, nor Rangan, the father of the parties before his death, did have any right of easement either prescriptive or grant or by way of necessity, as claimed by the appellant/plaintiff and that the suit came to be filed with an intention of harassing and cause loss and inconvenience to the respondent/defendant. The respondent/defendant further averred that there was an east-west cart-track on the north of the plaintiffs property; that Rangan, the father of the parties to the suit and subsequently his legal heirs had been using only the said east-west cart-track available on the north which connects Murugan Koil Road and that the plaintiff purposely suppressed the existence of the said cart-track and filed the suit with a false claim. In addition, the respondent/defendant had also stated that the appellant/plaintiff obliterated a portion of the north-south cart-track on the eastern portion of S.Nos.392/1 adjoining to his share and thereafter approached the court with the suit with a false claim and that therefore the suit filed by the appellant/plaintiff should be dismissed with cost.

6. Based on the above said pleadings, the learned trial judge framed three issues and three additional issues and conducted a trial. In the trial, four witnesses were examined as PWs.1 to 4 and nine documents were marked as Exs.A1 to A9 on the side of the appellant herein/plaintiff. The respondent herein/defendant figured as the sole witness (DW1) and marked a single document as Ex.B1 on his side. One document produced by a witness was marked as Ex.X1 and the reports and plans submitted by the Advocate appointed by the trial court were marked as court documents and numbered as Exs.C1 to C4.

7. The learned trial judge, on an appreciation of evidence, accepted the case of the appellant herein/plaintiff and decreed the suit as prayed for by judgment and decree dated 20.03.2006. As against the said decree of the trial court, the respondent

herein/defendant filed A.S.No.30/2007 on the file of the lower appellate court and the learned lower appellate judge, by judgment and decree dated 26.09.2007 allowed the appeal without cost, set aside the decree passed by the trial court and dismissed the suit O.S.No.33 of 1999 on the file of the trial court.

8. As against the reversing decree of the lower appellate court, the present second appeal has been brought-forth by the appellant herein/plaintiff on various grounds set out in the Memorandum of Grounds of Second Appeal.

9. The second appeal was admitted on 29.10.2009 and at the time of admission, the following questions were formulated as the substantial questions of law involved in the second appeal:

Substantial Questions of Law:

"1) Whether the lower appellate court is justified in reversing the decree holding that there are two pathways available on perusal of documents forgetting the fact that the defendant himself did not plead the existence of another pathway so as to deny the easmentary right in favour of the plaintiff?

2) Whether the lower appellate court is correct to hold the plaintiff has not established his right for the usage of common pathway available to prove his claim for easementary right through exhibit A-1 to A-4?

10. The arguments advanced by Mr.S.Kamadevan, learned counsel for the appellant and by Mr.N.Nicholas, learned counsel for the respondent were heard. The judgments of the courts below and the materials available on record were also perused.

11. The first substantial question of law seems to have been formulated, based on an erroneous assumption that the respondent herein/defendant himself had not pleaded the existence of another cart-track/passage apart from the suit cart-track regarding which the reliefs of declaration and injunction had been sought for by the appellant herein/plaintiff. Such a question had been projected as a substantial question of law, perhaps by misleading this court without drawing its attention to the contents of the written statement of the respondent herein/defendant. There is a clear averment made in the written statement of the respondent herein/defendant that an east-west cart-track runs on the north of the plaintiff's share and it connects the Murugan Koil road and that through the said east-west cart-track alone Rangan, the father of the parties, during his life time and after his death, his legal heirs were reaching their respective shares in the property comprised in S.No.392/1. The alleged existence of the said east-west cart-track on the north of the share of the appellant herein/plaintiff was cited as an alternative cart-track to reach

the shares of the appellant herein/plaintiff and the other legal heirs of Rangan. In order to defeat the claim of the appellant herein/plaintiff that there was no other access to the plaintiff's property except the suit cart-track to their respective portions and that the suit cart-track was the one referred to as mamool cart-track in all the sale deeds and other documents under which the parties derived their title, the alleged existence of the east-west cart-track on the north of the share of the appellant/plaintiff came to be cited by the respondent/defendant. The relevant portion in paragraph 3 of the written statement of the respondent herein/defendant will make it clear. For better appreciation the same is extracted here under:

"3.....The litigants' father Rangan and subsequently his legal heirs have been using only the east west cart-track, adjacent to the plaintiff's share on the northern side which reaches the Murugan Koil Road. The plaintiff has purposely suppressed the said cart-track and has filed this false suit."

12. The above said averment made in the written statement makes it clear that the defendant had taken a definite plea that there exists an alternative cart-track on the north of the share of the appellant herein/plaintiff; that such plea was taken with a view to defeat the claim of the appellant herein/plaintiff; that the suit cart-track was the only access and it was used for reaching the share of the plaintiff in S.No.392/1 for more than the statutory period and thus the appellant/plaintiff acquired an easementary right by prescription. Such a clear plea was suppressed by the appellant herein/plaintiff and this court was misled to frame the first substantial question of law as if respondent herein/defendant did not plead the existence of another cart-track for denying easementary right claimed by the appellant herein/plaintiff in respect of the suit cart-track. The absence of plea has to be differentiated from proof of such a plea. The question formulated as the first substantial question of law refers to the absence of plea and not proof of such plea. It has been indicated supra that the reference to absence of such a plea was has been made on a misconception as if the respondent/defendant failed to make any such plea of existence of another cart-track. Hence, this court hereby holds that the second appeal does not involve such a substantial question of law (question formulated as question No.1 at the time of admission) and that the said question has been formulated under a misconception without advertting to the relevant part of the written statement of the respondent herein/defendant. The first substantial question of law is answered accordingly.

13. We have seen in the foregoing discussions that the respondent herein/defendant had pleaded the existence of another cart-track on the north of the plaintiff's share to deny the right

of easement claimed by the appellant herein/plaintiff in respect of the suit cart-track shown as ABCDEFGHIJK in the plaint plan. The next question that arises for consideration is whether the appellant herein/plaintiff has substantiated his case that he has got a right of easement by prescription to use the suit cart-track to reach his share, which forms on the northern most part of the S.No.392/1.

14. According to the claim of the appellant herein/plaintiff, the sale deed under which Rangan (the father of the parties to the suit) purchased the property comprised in S.No.392 referred to mamool cart-track and easements. The said aspect in the case of the plaintiff has not been disputed. For understanding the case of the plaintiff, the topography of the properties of the parties to the suit and the properties through which mamool cart-track, according to the appellant/plaintiff runs, have to be looked into. S.No.392 lies on the north of S.No.393. Admittedly, the entire extent comprised in S.No.392 was purchased by Rangan, the father of the plaintiff and the defendant. Such purchase was made long back in the year 1959. After his purchase, the southern most part of the said survey number measuring 1.19 acres was conveyed by Rangan in favour of his younger son, namely the respondent herein/defendant under the sale deed dated 08.03.1984, a certified copy of which has been marked as Ex.A5. Before getting the sale under the original of Ex.A5, the respondent herein/defendant had purchased a part of S.No.393/1 under the original of Ex.A1 dated 13.11.1981. Subsequent to the execution of the original of Ex.A5-sale deed in respect of the southern portion of S.No.392, which was sub divided and re-numbered as 392/2, the respondent herein/defendant purchased another portion of S.No.393. The property purchased under the originals of Exs.A1 and A2 dated 13.11.1981 and 01.06.1984 formed a single block. The said portion purchased by the respondent herein/defendant under the originals of Exs.A1 and A2 has been sub-divided and re-numbered as S.No.393/1. Even in Ex.A1 dated 13.11.1981, a north-south cart-track running on the western portion of S.No.393/1 measuring a width of 10 feet had been referred to as the cart-track over which the defendant would have a right of access to his land purchased under Ex.A1. In the sale deed dated 08.03.1984, a certified copy of which has been marked as Ex.A5, under which S.No.392/2 had been purchased by the respondent herein/defendant from his father Rangan, the respondent herein/defendant had been given a right to take water to his land from the wells in S.Nos.392/1 and 392/2 through the channel running along the said survey numbers and also the right of passage in those survey numbers. In addition, the right of use of mamool cart-track has also been referred to. Therefore, it is quite clear that, when the respondent herein/defendant purchased a portion of his father's land under the original of Ex.A5, there was a mamool cart-track, through which the parties did have an access to their portions.

15. Subsequently, the appellant herein/plaintiff got two acres in S.Nos.391/1 forming the northern most plot of the said land under the original of Ex.B1-Settlement Deed dated 23.08.1988. The said document was not produced by the appellant herein/plaintiff. On the other hand it was produced by the respondent herein/defendant. In the said document, north-south cart-track running on the eastern part of the entire property held by Rangan has been referred to as the eastern boundary of the property settled on the appellant herein/plaintiff. Apart from stating that there existed a north-south cart-track on the eastern boundary of the entire property of Rangan comprised in S.No.392, there is no recital that the said cart-track is connected with an east-west cart-track running on the north of S.No.392. The trial court appointed an Advocate-Commissioner and he submitted his first report and plan dated 16.08.1999. The same were marked as Exs.C1 and C2. In Exs.C1 and C2, though an east-west cart-track was shown to run on the north of the plaintiff's property, the cart-track running on the east and south of S.No.392 had been referred to as 3 feet pathway and it was shown to connect the east-west cart-track running on the north of the said survey field. As it was contended in the objections filed to the Advocate-Commissioner's Report that the said particulars were not correct, the Commissioner's warrant came to be re-issued in I.A.No.118/2003 and the fresh report and rough sketch filed by the Advocate-Commissioner on 25.09.2003 came to be marked as Exs.C3 and C4. Even in Exs.C3 and C4, the breadth of the suit cart-track has not been shown clearly. It has been simply coloured in blue. However, in Ex.C4, the east-west cart-track running on the north of S.No.392 is not shown to be adjoining S.No.392. The said documents shall not be of much help to decide the fact in issue.

16. The village map marked as Ex.X1 will show that there is no plan marked cart-track running on the north of S.No.392 in the east-west direction. In this regard, it is the clear and categorical assertion of the plaintiff as PW1 that there is a cart-track branching from pallam in S.No.393 and that it proceeds towards north on the western border of S.No.393, turns towards east, then turn towards right and ultimately reaches the property of the plaintiff. It is his further assertion that the said cart-track is of a width of 16 feet; that it was in existence from 1959 and that his father and after him the plaintiff and other heirs of Rangan were enjoying the said cart-track as a right of easement to reach their lands for more than 40 years. It is his further assertion that by such long continuous use, without any break/hindrance, they had acquired easement by prescription and that since the respondent herein/defendant started to interfere with such exercise of the easementary right, he had approached the court with the suit. It is his further contention that since they did have the right of easement to use the suit cart-track before partition, the plaintiff became entitled to the said easementary right after partition by way of an easement by necessity also. It is true that the suit cart-track has not been specifically referred

to in Ex.B1-Settlement deed and on the other hand, it has been referred to as mamool cart-track. The same has been admitted by DW1 in cross examination. It is also the evidence of PW1 that on the eastern part of the property comprised in S.No.392, 30 cents of land had been set apart to be used as north-south cart-track. A suggestion had been put to him by the counsel for the respondent/defendant that the said land forming the eastern part of the survey field 392 has been left as an access to the plaintiff's property and the same was admitted by PW1. If at all the property did have an access from north, there would not have been any necessity to provide a cart-track on the eastern side of the property as an access to the share to the property of the plaintiff, which form northern part of S.No.392. Though PW1 would have admitted that there is an east-west cart-track on the north of his property and the same touches the main road on the east, he made a clear assertion that the 16 feet cart-track provided on the eastern part of their properties did not get connected to the said east-west cart-track. It is also his assertion that immediately on the north of his property, property belonging to a third party situates and for coming from the east-west cart-track, the owner of the said property should give permission.

17. The evidence of PW1 gets corroboration in this regard from the evidence of PW2-Pannan. PW2 is one of the vendors in Ex.A1 under which a part of S.No.393/1 was purchased by the respondent herein/defendant. He has supported the case of the appellant herein/plaintiff by stating that even before the execution of the said sale deed, the appellant herein/plaintiff, respondent herein/defendant and their father Rangan were using the cart-track to reach their land on the north of the said land. Similarly, PW3, Senior Draughtsman in the office of the Survey, Sathyamangalam has produced Ex.X1-Village map. It is his evidence that there is a cart-track as shown in Ex.X1 running through survey Nos.350, 351, 356 and 363 and it branches at Ayyampalayam and ends at S.No.363 vari poramboke. PW4 is the owner of the land, which lies on the south of the properties purchased by the respondent herein/defendant under Exs.A1 and A2. He corroborates the evidence of PW1 that there was a cart-track starting from vari poramboke and it passes through PW2's land (sold to the respondent herein/defendant under Ex.A1), turns towards east and then it leads to the shares of the parties to the suit. He has clearly asserted that from 1961 onwards, the said cart-track was in existence and the father of the parties to the suit as well as the parties to the suit were not using the said cart-track alone to reach their properties. It is his further assertion that they were using the cart-track that runs on the north of the plaintiff's land and that the said cart-track exclusively belongs to the owner of the land through which it passes.

18. On the other hand, except the interested testimony of DW1, there is no other evidence of any independent witness to support his case that the parties were using the cart-track running

in the property lying on the north of the plaintiff's property and they never used the suit cart-track as an access to the land. However, it is his contention that the cart-track in S.No.364 connecting S.No.393/1 was purchased by him and the suit cart-track is nothing but a cart-track formed by him as an access to his land in S.No.392/2 and his share in 392/1 alone. It is an admitted fact that there is a 16 feet cart-track mentioned in Ex.B4-Partition Deed. DW1 also admits that the said cart-track extended up to the plaintiff's property through the property of Pannan (PW2), which was purchased by the respondent herein/defendant under Ex.A1. It is also an admission made by DW1 that the cart-track running through land of Pannan was also referred to in the partition deed. The further admission made by DW1 is that there is a recital in the partition deed to the effect that the use of the mamool cart-track should not be prevented by others. DW1 admits that the suit cart-track runs on the borders of S.No.393/1 and 392/2. However, he would claim that he had purchased a portion of S.No.364 for his exclusive use as cart-track. The said sale deed was not produced by him. On the other hand, the appellant herein/plaintiff has produced a certified copy of the said sale deed as Ex.A3. In Ex.A5 under which the defendant purchased 1.19 acres from his father in S.No.392, it has been clearly mentioned that the sale was inclusive of mamool cart-track leading to the sub divisions of S.No.392. The attempt made by the respondent/defendant to show that mamool cart-track referred to in the said sale deed would be the cart-track running on the north of the plaintiff's property ended in a failure, as clear evidence has been adduced to the effect that the north-south cart-track left on the eastern part of the suit survey No.392, did not and does not get connected to the east-west cart-track running on the north of the property of the appellant/plaintiff. We have also seen that the evidence adduced through PW3 that the said cart-track lying on the north of the plaintiff's property was the exclusive cart-track belonging to the owner of the said land.

19. In addition, it is also a fact admitted by the respondent/defendant that the appellant/plaintiff obliterated a portion of the north-south cart-track provided on the eastern border of the land comprised in S.No.392 and the same was the reason why he had to purchase a piece of land under Ex.A1 to provide a cart-track to reach his property. If at all the cart-track provided on the eastern border of S.No.392 as stated in the partition deed and the sale deeds was the mamool cart-track connecting the east-west cart-track running on the north of the appellant's/plaintiff's property, the respondent/defendant would not have kept quiet when a portion of the cart-track in S.No.392 parallel to the share of the plaintiff was obliterated and he would have chosen to sue him for the restoration of the cart-track. On the other hand, the evidence shows that it was the defendant, who gave a complaint to the police not claiming that the mamool cart-track is the cart-track running on the north of the plaintiff's property, but contending that the plaintiff did not have a right to

use of the suit cart-track. All these aspects were not taken into consideration.

20. Though the lower appellate court is the final court of appeal on facts, when the finding of the lower appellate court regarding the existence of an alternative cart-track to make an inference possible that the suit cart-track should not have been the mamool cart-track referred to in the documents under which the parties to the suit claim title, is challenged as a perverse finding, it becomes all the more necessary for this court to consider the evidence to find out whether such a finding of the lower appellate court reversing the finding of the trial court could be termed perverse. In fact, the second substantial question of law formulated can be understood as the one dealing with the perversity or otherwise of the finding of the lower appellate court regarding the existence of an alternative cart-track and the finding that the suit cart-track was not the mamool cart-track referred to in the documents relied on by the parties, especially Exs.A1 to A4. The above said discussion will make it clear that the finding of the lower appellate court, in this regard, holding that the appellant/plaintiff did have an alternative access through the east-west cart-track running on the north of his property and that hence the claim that the suit cart-track was the mamool cart-track referred to in Exs.A1 to A4, especially the partition deed, copy of which has been marked as Ex.A4, can be termed a perverse finding, as no reasonable person would arrive at such a conclusion based on the evidence available. Hence the second substantial question of law is answered accordingly in favour of the appellant/plaintiff and against the respondent/defendant.

21. For the grievance of the respondent/defendant that the appellant/plaintiff obliterated a part of 16 feet north-south cart-track provided on the eastern border of S.No.392/1, the learned counsel for the appellant/plaintiff has submitted that the appellant/plaintiff is prepared to leave 16 feet space for the common use of the parties. A memo to that effect has been filed by the appellant/plaintiff. The same is recorded. In the light of the said submission and the Memo, if the appellant/plaintiff causes any obstruction for the use of the said part of the cart-track, it shall be open to the respondent/defendant to seek appropriate remedy by initiating appropriate proceedings in an appropriate forum. The respondent/defendant shall not be justified in obstructing the use of the suit cart-track by the appellant/plaintiff as an act of tit for tat. For all the reasons stated above, this court comes to the conclusion that the decree of the appellate court reversing the decree of the trial court cannot be sustained and the same deserves to be set aside, thereby restoring the decree passed by the trial court.

In the result, the second appeal is allowed. The decree of

the appellate court dated 26.09.2007 made in A.S.No.30 of 2007

reversing the decree passed by the trial court in O.S.No.33 of 1999 is set aside. The decree of the trial court dated 20.03.2006 made in O.S.No.33 of 1999 shall stand restored. However, there shall be no order as to cost. Consequently, the connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

asr/-

To

- 1.The Principal Subordinate Judge, Gopichettipalayam
- 2.The District Munsif, Sathyamangalam.

Copy to:The Section Officer, V.R.Section,High Court, Madras-104.

1 cc to Mr. S.Kamadevan,Advocate, SR.No.80471

1 cc to Mr.V.Niccholas ,Advocate, SR.No.7992

in S.A.No.180 of 2008

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