

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.03.2015

CORAM

THE HONOURABLE MR. JUSTICE S.NAGAMUTHU

Second Appeal No.110 of 2015 and
M.P.No.1 of 2015

R.Subbaraya Gounder

... Appellant/Defendant

Vs.

Kaliyappan

... Respondent/Plaintiff

Prayer:- This second appeal has been filed under Section 100 C.P.C., against the judgement and decree dated 28.02.2013 made in A.S.No.43 of 2012 on the file of the learned Subordinate Judge, Tirupur confirming the judgement and decree dated 25.10.2010 made in O.S.No.125 of 2004 on the file of the learned District Munsif, Tiruppur.

For Appellant : Mr.Sam Jeyaraj Houston
For Respondent : Mr.R.Rajarajan for
M/s.V.Mylsamy

JUDGEMENT

The defendant in O.S.No.137 of 1997 on the file of the learned Subordinate Judge, Tiruppur is the appellant herein. The respondent is the second plaintiff in the suit. The first plaintiff in the suit was one Mrs.Valliyammal, who died during the pendency of the suit and the second plaintiff was recorded as her legal representative. On transfer to the file of the learned District Munsif, Tiruppur, the suit was re-numbered as O.S.No.125 of 2004. The said suit was filed for declaration of title for the cart track described as the suit property and for permanent injunction to restrain the defendant from in any manner interfering with the plaintiffs' peaceful possession and enjoyment of the same.

2.The trial Court by decree and judgement dated 25.10.2010, partly decreed the suit thereby granting permanent injunction in favour of the plaintiffs thereby restraining the defendant from interfering with the peaceful possession and enjoyment of the suit cart track to the width of 20 feet, running North-South on the West of the defendant's property in S.F.No.105/4, leading to plaintiffs' property in S.F.No.105/4C. As against the denial of decree for declaration of title, the plaintiffs did not file any appeal. As against the decree for permanent injunction granted in favour of the plaintiffs, the defendant filed an appeal in A.S.No.43 of 2012 on the file of the learned Subordinate Judge, Tiruppur. By decree and

judgement dated 28.02.2013, the First Appellate Court dismissed the appeal thereby confirming the decree for permanent injunction granted by the trial Court. As against the same, the defendant is before this Court with this second appeal.

3.The case of the plaintiff in brief is as follows:-

The first plaintiff Mrs.Valliyammal, her brother Mr.Rakkia Gounder and her other brothers have partitioned the joint family properties by means of a registered partition deed dated 03.05.1949 (Ex.A.1). As per the said partition deed, Mrs.Valliyammal was allotted 0.55 acres in S.No.105/3 in Iduvampalayam Village. On the East of the land in S.No.105/3, lies the land in S.No.105/4. The total extent of the property comprised in S.No.105/4 is 86 cents. The Western portion measuring 9 cents was allotted to Mrs.Valliyammal, the first plaintiff. Thus, Mrs.Valliyammal was allotted 55 cents in S.No.105/3 and 9 cents in S.No.105/4. The remaining 77 cents which is the Eastern portion in S.No.105/4 was allotted to one of her brother Mr.Rakkia Gounder. The defendant is the son of Mr.Rakkia Gounder and thus, he has inherited the said property from Mr.Rakkia Gounder. The second plaintiff is the son of Mrs.Valliyammal namely the first plaintiff. Thus, the plaintiffs are entitled for 55 cents in S.No.105/3 and 9 cents in S.No.105/4 which is the western portion. To this extent, there is no dispute.

4.Now, according to the plaintiffs, on the East of 9 cents allotted to the plaintiffs in S.No.105/4, there is a cart track running North-South. According to the plaintiffs, that cart track is to be used to take carts, cattle etc., to their other lands which were also subject matter of the partition deed. Thus, according to the plaintiffs, the land measuring 6 cents on the immediate East of 9 cents allotted to the plaintiffs in S.No.105/4, is the cart track and which absolutely belongs to the plaintiffs. Since, the defendant attempted to disturb their possession, the plaintiffs have filed the present suit.

5.It is also stated that on an earlier occasion, the defendant herein filed a suit against the plaintiffs in O.S.No.742 of 1991 for declaration of title and for injunction for the entire 77 cents which is the eastern portion of S.No.105/4. In that suit, the defendant herein had suppressed the fact that the plaintiffs have got easementary right to use the cart track which lies in S.No.105/4. However, the trial Court decreed the suit. But, on the ground of suppression of easementary right of the plaintiffs herein, the First Appellate Court in A.S.No.3 of 2002 reversed the decree and judgement of the trial Court and dismissed the suit. That has become final.

6.In the present suit, the plaintiffs have contended that since, in A.S.No.3 of 2002, the easementary right of the plaintiffs over the suit property has been declared by the First Appellate Court, the defendant in the present suit cannot deny the same as they are barred by the principles of res judicata.

7.The defendant in his written statement, disputed the claim for title made by the plaintiffs. He also disputed the easementary right of the plaintiffs over the suit property to use the same as cart track.

8.Based on the above pleadings, the trial Court framed appropriate issues. On the side of the plaintiffs, two witnesses were examined and 13 documents were exhibited and on the side of the defendant, three witnesses were examined and no document was exhibited. An Advocate Commissioner was appointed to note down the physical features of the suit property and whose report was marked as Ex.C.1 and rough sketch submitted by him was marked as Ex.C.2.

9.Having considered all the above, the trial Court decreed the suit in part as mentioned above which was confirmed by the First Appellate Court. That is how the appellant/defendant is before this Court with this second appeal.

10.In this second appeal, from the pleadings, evidences and the judgements of the Courts below, I find the following substantial questions of law have arisen for consideration:-

"1.Whether the decree in A.S.No.3 of 2002 is a res judicata for the defendant to dispute the claim of the plaintiffs in the present suit ?

2.In the absence of description of the area of the land which could be used as cart track, whether the Courts below were right in granting decree for permanent injunction in respect of 6 cents of land in S.No.105/4 in favour of the plaintiffs ?

3.When the plaintiffs have not claim right of easement, whether the Courts below were right in granting decree for permanent injunction in favour of them ?

4.Whether the Courts below were right in granting decree for injunction as though the suit property is in the exclusive possession of the plaintiffs ?"

11.I have heard Mr.Sam Jeyaraj Houston, learned counsel for the appellant and Mr.R.Rajarajan, learned counsel for the respondent and I have also perused the records carefully.

12.Mr.Sam Jeyaraj Houston, learned counsel for the appellant would submit that the Courts below were not right in granting decree for permanent injunction in favour of the plaintiffs. Even in Ex.A.1, the partition deed, it has not been mentioned that the plaintiffs have got exclusive right to use the suit property measuring 6 cents as cart track. The learned counsel would further submit that in the earlier suit in O.S.No.742 of 1991, it was not at all an issue as to whether the plaintiffs herein are entitled for 6 cents of land to be used as a cart track. Thus, according to the learned counsel, the

principles of res judicata is not applicable in the instant case against the appellant/ defendant. The learned counsel would further submit that when the right of easement has not been pleaded by the plaintiffs, it is not open for the Courts below to grant a decree for permanent injunction assuming that the right is only an easementary right. For all these reasons, according to the learned counsel, the decree and judgement of the trial Court and confirmed by the First Appellate Court in respect of the grant of decree for injunction deserves to be set aside.

13.The learned counsel for the respondent/second plaintiff would vehemently oppose this second appeal. According to him, so far as the decree for declaration of title is concerned, the denial of decree has become final as the respondent has not filed any appeal against the same. So far as the decree for injunction is concerned, according to the learned counsel, the Courts below have gone by the revenue records more particularly, the Field Measurement Book. The learned counsel would further submit that as per Ex.A.1, it is crystal clear that the plaintiffs have got easementary right to use the land in S.No.105/4 lying on the immediate East of 9 cents allotted to Mr.Valliammal as a cart track. The learned counsel would further submit that based on the said partition deed and the revenue records, the revenue authorities have classified 6 cents in S.No.105/4 as cart track and that has been duly described in the suit schedule also. Therefore, according to him, there is nothing illegal in granting decree for permanent injunction in favour of the plaintiffs.

14.So far as the plea of res judicata as claimed by the defendant/appellant is concerned, since, in the earlier suit in O.S.No.742 of 1991 itself, the right of easement has been declared by the Court, it is not open for the defendant to raise it again. At any rate, according to the learned counsel for the respondent/ second plaintiff, the decree and judgement of the trial Court deserves to be confirmed.

15.I have considered the above submissions.

16.So far as the plea of res judicata is concerned, I do not find any substance at all in the case of the plaintiffs. As pointed out earlier, the earlier suit was for declaration of title in respect of entire 77 cents of land. That suit was filed by the defendant herein. The consequent relief of injunction was also sought for. Though decree was granted by the trial Court, it was set aside by the First Appellate Court because, the defendant herein had suppressed the fact that the plaintiffs herein have got right of easement on the said property. It was not at all either directly or indirectly in issue as to whether the plaintiffs herein have got any right over the specific area of 6 cents of land in S.No.105/4. The extent of the land was never in issue. Therefore, in my considered opinion, the findings recorded by the Civil Court in the earlier proceedings shall not operate as res judicata in the present suit so far as the defendant is concerned. Thus, the first question of law is answered in favour of the appellant.

17.Now, turning to the other questions of law, it is obvious that Ex.A.1 partition deed simply mentions that Mrs.Valliammal and the respondent herein would use the land allotted to Mr.Rakkia Gounder as a pathway and (in vernacular language), it is mentioned as "jlk;" Thadam. It is now sought to be interpreted as "cart track". Assuming that the plaintiffs can take the cart using the land in S.No.105/4 which was allotted to Mr.Rakkia Gounder, but, the plaintiff cannot claim exclusive right to use the same to the exclusion of the defendant.

18.Admittedly, the defendant is the owner of the suit property and he has got every right to enjoy the said portion. His right to enjoy, his right to use the suit property either as a cart track or for any other purpose cannot be injunctioned. The limited right of the plaintiffs can claim is, as and when required, they cannot be prevented from taking the cart from one side of the land to other side. But, the Courts below have granted a decree for permanent injunction as though the plaintiffs have got exclusive right and possession over the suit property. Thus, the decree granted by the trial Court confirmed by the First Appellate Court cannot be allowed to be sustained.

19.Above all, it is not understood as to how the First Appellate Court has come to the conclusion that the plaintiffs are entitled for 6 cents in S.No.105/4 so as to use the same as cart track when there is no such extent mentioned in Ex.A.1 partition deed. The only explanation offered by the learned counsel for the respondent is that the revenue authorities have stated so in the revenue records including the Field Measurement Book.

20.In my considered opinion, the revenue authorities are not competent to describe or define the area, over which, the plaintiffs have got some right. Therefore, based on the revenue records, the extent of the land cannot be decided and thus, on this score also, the Courts below have committed an error.

21.Above all, nowhere in the plaint, the plaintiffs have claimed easementary right over the suit property. They have claimed title over the suit property only by way of adverse possession. Further, the plaintiffs claim exclusive possession over the suit property. This claim is absolutely erroneous and therefore, the Courts below ought not to have granted decree as it has been done. Thus, I am inclined to answer all the substantial questions of law in favour of the appellant. I can only clarify that as and when required, the plaintiffs can use the suit property allotted to the defendant in the partition in S.No.105/4 to take cart without causing any hindrance to the defendant from enjoying the suit property. For these reasons, I am inclined to allow the second appeal thereby setting aside the decree of permanent injunction granted by the trial Court and confirmed by the First Appellate Court.

22.In the result, the second appeal is allowed and the decree

and judgement of the trial Court in O.S.No.125 of 2004 dated 25.10.2010 confirmed by the First Appellate Court in A.S.No.43 of 2012 dated 28.02.2013, granting decree for permanent injunction is hereby set aside. Consequently, the entire suit in O.S.No.125 of 2004 stands dismissed. There shall be no order as to cost. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

jbm

To

1.The Subordinate Judge,
Tirupur.

2.The District Munsif,
Tiruppur.

1 cc to Mr.K.Myilsamy ,Advocate, SR.No.17143

1 cc to M/s.Sarvabhauman Associates ,Advocate, SR.No.17096

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pmk.1.6.2015



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