



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:31.08.2015

CORAM:

THE HON'BLE TMT.JUSTICE PUSHPA SATHYANARAYANA

S.A.No.9 of 2011

and

M.P.No.of 2011

Mohanasamy

... Appellant/Defendant

-vs-

1.Palanisamy Gounder

2.P.Sakthivel

3.P.Ragunathan

...Respondents/Plantiffs

Appeal under section 100 of Civil Proceedure Code against the judgment and decree dated 30.04.2010 made in A.S.No.59 of 2009 on the file of the Principal Sub Court, Erode, reversing the judgment and decree dated 20.08.2009 made in O.S.No.123 of 2007 on the file of the Principal District Munsif Court, Erode.

For Appellant : Mr.T.Murugamanickam

For Respondents : Mr.V.S.Senthil Kumar

JUDGMENT

The defendant aggrieved by the decree granted in a suit for declaration of plaintiffs' right to use the 'B' schedule cart track and LBP channel therein to irrigate the 'A' schedule property and for mandatory injunction, restraining the defendant to restore the cart track and for permanent injunction, restraining the defendant from interfering with the use of 'B' schedule cart track and channel by the plaintiffs.

2. The suit properties are agricultural lands and the cart track, that was situate at Samigoundanpalayam Village. The father of the first plaintiff and the father of the first defendant are sons of one Palanivelappa Gounder on 04.11.1961. The father of the first plaintiff executed a sale deed with respect to 1/4th share in Survey No.15/1 in favour of the defendant's family with a right to re-purchase the same. The said property covered under Ex.A.1 is the 'A' schedule property. Subsequently, the said properties were reconveyed by the mother and brother of the defendant by virtue of a gift settlement deed on 24.03.1969 under Ex.A2. Thereafter, there was a partition between the defendant and his brother on 09.12.1977 as per Ex.A3. The brother of the defendant sold



his share of the properties to one Veera Boyan under Ex.A.4.

3. Later, the defendant himself had purchased the land from the said Veera Boyan. There was a division between the plaintiffs' and the defendant of the ancestral properties, in which, the first plaintiff was allotted the northern part and southern part was allotted to the defendant. The LBP channel is on the southern side of the defendant's land formed in the year 1952, just above the channel, a jeep road was also formed. On the western side of the land, a 12 feet North-South cart track was formed to reach the land of the first plaintiff. At the time of the said division, the said cart track and the channel are described as 'B' schedule property in the suit. According to the plaintiff, 'B' schedule cart track is the only access to the 'A' schedule agricultural land for the purpose of taking cattle, carts, tractors etc and for taking out the agricultural produces from the lands. Therefore, the first plaintiff claims as the easement of necessity to use the 'B' schedule cart track to reach his land. It is also the further case of the first plaintiff that he has been using the 'B' schedule cart track, openly, continuously, to the knowledge of the defendant and his predecessors in title for more than the statutory period and thereby he has perfected his right by way of prescription. The defendant was compelling to part with his land and the plaintiff refused, which resulted in animosity between the parties. The plaintiff alleged that the defendant therefore deliberately had obliterated the portion of the 'B' schedule cart track to the length of 50 feet x 10 feet, in which has resulted in a suit.

4. Resisting the suit, the defendant had averred in the written statement that there is no North-South cart track with the width of 12 feet on the Eastern side of the plaintiffs'. Under the settlement deed dated 24.03.1969, the plaintiff and his father were given a specific extent of 63 cents and to reach the said lands. A North-South pathway was created on the Western boundary fence only to be reached by foot. The said settlement deed also refers only a foot pathway and does not refer to a cart track as claimed in the plaint. Even in the partition deed dated 09.12.1977, the defendant and his brother had left 12 feet width pathway on the Western side in Survey No.15/1 and it is only exclusively for the defendant and his brother and not for the benefit of the plaintiff. The plaintiff can have only a foot pathway and not a cart track as claimed by him. The contention of the plaintiff that the defendant had obliterated the existing cart track is denied by the defendant. In the absence of any cart track, the suit claim is impermissible and the same was sought to be dismissed by the defendant.

5. Before the trial Court, on the side of the plaintiffs, the first plaintiff was examined himself as P.W.1 and two more witnesses were examined and marked Exs.A1 to A7.



On the side of the defendant, the defendant was examined himself as D.W.1 and one more witness was examined and no Exhibits were marked. Exs.C1 and 2 were marked as Court documents.

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6. The trial Court on consideration of the facts and evidence had dismissed the suit and on appeal, the same was reversed and the decree was granted in favour of the plaintiff. Aggrieved by the same, the above second appeal has preferred.

7. Though only notice was issued at the time of admission, the following question of law was suggested for consideration.

a. When a right of way has been made in favour of named persons by way of grant, whether this right can enure in favour of third persons unconnected with the grant?.

8. The 'A' schedule property is the property belonging to the plaintiff and the 'B' schedule property is the alleged cart track through which the plaintiff claiming the right. The said 'B' schedule property is the North-South pathway to reach the 63 cents of the plaintiffs' land on the Northern side. The case of the plaintiffs' is that the defendant had obliterated the said cart track to an extent of 50 feet x 10 feet. The plaintiffs claim the right to the above said property under the documents Exs.A1 to A4. The properties in dispute were originally in single plot belonging to the plaintiffs' and the defendant as they are ancestral in nature. Then, there was a division of the properties in which the father of the first plaintiff was allotted the Northern part and his brother was allotted the southern part. South of the entire property is the LBP channel, which was formed in the year 1952 and there is also a jeep road on the southern side of the LBP channel.

9. According to the first plaintiff, there is a North-South, 12 feet broad cart track, which was formed on the Western side of the land of the defendant to reach the plaintiff's land. The 'B' schedule property cart track is only access to the 'A' schedule agricultural land for the purpose of taking cattle, carts, tractors etc and for bringing back the agricultural products. Hence, the plaintiff claimed under the Easement of Necessity for the use of cart track. The plaintiff had also contended that the said extent of 'B' schedule cart track is mentioned even in the partition dated 09.12.1977 and the sale deed dated 08.12.1977. This is denied by the defendant/appellant, contending that the partition was only between the defendant and his brother. Therefore, while dividing the land for the sake of convenience, the defendant and his brother formed 12 feet width on the Western side of S.No.15/1 to reach their respective lands. The recitals with respect to the said cart



track in Ex.A3 is only for the benefit of the parties to the documents viz., the defendant and his brothers which cannot allowed to be taken advantage by the plaintiffs'. Later, the defendant's brother had sold his share to one Veera Boiyan under Ex.A-4. Subsequently, the defendant himself had purchased the same from the said Veera Boiyan. Hence, the defendant became the absolute owner of the entire land as well as the cart track, which was created for the use of the defendant's brother through the division in the year 1977. When the defendant re-purchased the property from the said Veera Boiyan, the right of Necessity became extinguished. By virtue of re-purchase the property has become one block and the cart track on the Western side is unnecessary. Hence, the defendant had to close the same. If at all, the plaintiff has got any right to reach the land, it can only be a foot pathway. He cannot claim right in taking advantage of the cart track, which was given as a grant to Veera Boiyan. Besides, the lower appellate Court, presumed that the cart track provided under Ex.A3-Partition deed ended with the respondent's property and that he has got the right of access over the same, whereas the right of access given to the appellant's brother, which right continued his vendor Veera Boiyan ended with the plaintiff's property.

10. The lower appellate Court is wrong in discrediting in Ex.A3 on the ground that it was created only to deny the right of the plaintiff. Even from the report of the Commissioner, there is no proof for the existence of any cart track. Therefore, the presumption of the lower appellate Court that there was a cart track is unacceptable. Nevertheless, the plaintiff necessarily should have access on the Western side of the property to irrigate from LBP channel and also to have the cart track to take the tractors and bullock carts and also to bring back the agricultural products.

11. It is also evident that the plaintiff has got no other access excepting the suit pathway. But, whether, such pathway can be used as a cart track has not been decided by the lower appellate Court. Admittedly, as per Ex.A3, there was a 12 feet cart track for taking the tractor through the same. But, the lower appellate Court had found that there was only 9 feet width is available instead of 12 feet. Hence, had decreed the suit that the plaintiff is entitled to use the 9 feet cart track for taking the tractor through the same. But, the trial Court had specifically held that the plaintiff has not proved as per Ex.A.7, whether there was only a pathway or a cart track to the length of 50 feet. In the absence of the specific evidence from the plaintiff to establish the existence of the cart track whether the plaintiff may be entitled to only for a foot pathway or a cart track has to be decided.



12. No doubt the defendants had admitted the existence of the cart track when it was sold to Veera Boyan and subsequently, the said right was extinguished. The plaintiffs' were using the said cart-track during the ownership of Veera Boyan of the Northern portion of defendant's property. Such continuance of usage by the plaintiffs' now whether would be detrimental to the defendant is not pleaded and proved by the defendant. No doubt, otherwise the plaintiffs' are only entitled to a pathway and not cart track. The right claimed by the plaintiffs' are only accessory right and it should not be detrimental or inconvenient or injurious to the owners. The defendant has no objection for the plaintiffs' using the same as a foot pathway. However, the plaintiffs' have claimed right to use the 'B' schedule cart track by Easement of Necessity and by way of prescription.

13. Even according to the defendant, the said cart track was created when the sale was made in favour of Veera Boyan on 08.12.1977 and the plaintiffs' were also allowed to use the same. The cause of action arose in December 2006 when the allegedly defendant obliterated the suit cart track, more than 25 years later. Therefore, the plaintiff was allowed to use the cart track for more than the required statutory period.

14. It is useful to refer the decision of the Hon'ble Supreme Court in Ayyaswami Gounder vs. Munnuswamy Gounder 1984 (4) SCC 376 in this regard as follows:-

Para 10: "We find considerable force in this contention. In the absence of any specific pleading regarding prejudice or detriment to the defendants-respondents the plaintiffs have every right to use the common land and the common channel. The plaintiffs-appellants were claiming their right on the basis of admitted co-ownership rights which includes unrestricted user, unlimited in point of disposition, and the High Court was not justified in holding that the plaintiffs' right to take water was not acquired by any grant from the defendants-respondents or from any other sale deed. The right of co-ownership presupposes a bundle of rights which has been lost sight of by the High Court.

Para 11: The only restriction put by law on the common user of land by a co-owner is that it should not be so used as to prejudicially affect or put the other co-owner to a detriment."

15. In the absence of any specific pleading by the defendant that the usage of the cart track by the plaintiffs' would be detrimental to the defendant, the plaintiffs' cannot be prevented from using the common cart track to reach his



lands. Hence, the Court below are correct in directing the defendant to restore the cart track and permit the plaintiffs' to continue to use the same as before.

16. In view of the above, the judgment and decree of the lower appellate Court is confirmed and the Second Appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

sd/-
ASSISTANT REGISTRAR(CS-V)

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SUB ASSISTANT REGISTRAR

srn

To

1. The Principal Subordinate Judge, Erode
2. The Principal District Munsif , Erode.

Copy To:-

3. The Section Officer, V.R.Section,
High Court, Madras

+1 CC to Mr.T.Murugamanickam Advocate. Sr.No.46466
+1 CC to Mr.V.S.SenthilKumar Advocate. Sr.No.46538

S.A.No.9 of 2011
and
M.P.No.of 2011

CO-JSV
JD 19/10/2015