

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.10.2015

CORAM

THE HONOURABLE MR. JUSTICE P.R.SHIVAKUMAR

S.A.No.2222 of 2003

Sellappa Gounder

... Appellant/Plaintiff

-Vs-

1. Palanisami

2. Ponnammal

3. Muthusami

... Respondents/Defendant

Second Appeal filed under section 100 of C.P.C against the judgment and decree passed by the Sub-Court, Dharapuram in A.S.No.56 of 2001 dated 26.03.2002 confirming the judgment and decree passed by the District Munsif Court, Kangayam in O.S.No.184 of 1999 dated 21.08.2001.

For appellant : Mr.D.Krishnakumar

For Respondents : Mr.N.S.Sivakumar

JUDGMENT

The plaintiff in the original suit is the appellant in the second appeal. The defendants are the respondents. For the sake of convenience, the parties are referred to in accordance with their ranks in the suit.

2. The plaintiff filed the suit for a declaration that the portion marked as A B C D in the plaint plan is the common passage belonging to the parties to the suit and for a permanent injunction against the defendants not to obliterate the ridge and widen the passage and not to take carts and other vehicles through the suit property. The said prayer was made on the basis of the plea that in a partition that took place on 17.11.1959, alternative plots were allotted to the parties and common passage was allotted on the north eastern portion of the plot allotted to the plaintiff on the south western corner so that the plaintiff can use the same to reach the other plot allotted to him on the north eastern corner and at the same

time, a link would be provided to the plot allotted to the defendant in the north western corner and the other plot, namely the plot allotted on the south eastern corner to the defendant. According to the plaintiff, the disputed passage shown as "ABCD" in the plaint plan is 4 cuboid, equivalent to 6 feet wide, whereas the passage running on the south of the plaintiffs portion allotted on the south western corner is with the width of 6 cuboid equivalent to 9 feet. According to the plaintiff, "ABCD" passage having a width of 6 feet was meant for taking men and cattle alone and the defendants cannot be permitted to widen the passage to take carts and other vehicles through the disputed passage.

3. The defendants, without denying the plaint averments that the passage suit cart track running east-west on the south of the south-western plot allotted to the plaintiff was 6 cuboid equivalent to 9 feet and that the suit passage on the north-eastern corner of the south-western plot allotted to the plaintiff was 4 cuboid equivalent to 6 feet, contended that they were using the plaintiff's south western plot to take their carts to the defendants north-western part without having any defined course of track and that the plaintiff, who highhandedly cut and removed the Palmyra trees on the border of the defendant's land on the north-western portion, besides preventing the defendants from using the south-eastern plot allotted to the plaintiff tried to obstruct the defendants from using the suit cart track shown as "ABCD" in the plaint plan to reach the north western plot allotted to the defendants from the south eastern plot which also was allotted to the defendants and that only with a view to prevent the defendants from using the suit passage shown as "ABCD" in the plaint plan, the present suit came to be filed. Based on the pleadings, they prayed for the dismissal of the suit.

4. The learned trial Judge, framed necessary issues and conducted a trial. Two witnesses were examined as Pws 1 and 2 and four documents were marked as Exs.A1 to A4 on the side of the plaintiff. One witness was examined as DW1 and no document was marked on the side of the defendants. The reports and plans submitted by the Advocate-Commissioner appointed by the trial Court were marked as Exs.C1 to C4.

5. The learned trial Judge, after hearing the arguments advanced on both sides, considered the evidence and upon such consideration, came to the conclusion that the plaintiff was entitled to the relief of declaration that the suit passage shown as "ABCD" in the plaint plan jointly belonged to the plaintiff and the defendants. However, regarding the prayer of injunction, the learned trial Judge chose to hold that the plaintiff was entitled to an injunction against the defendants not to widen the passage by obliterating the ridge.

Accordingly, a limited injunction along with declaration as prayed for was granted by the trial Court by a judgment and decree dated 21.08.2001. As against the said decree of the trial Court, the plaintiff himself preferred an appeal in A.S.No.56 of 2001 on the file of the Sub-Court, Dharapuram. The learned lower appellate Judge, after hearing both sides, concurred with the findings of the trial Court and dismissed the appeal filed by the plaintiff by a judgment and decree dated 26.03.2002. It is as against the said decree of the lower appellate Court, the present second appeal came to be filed.

6. The second appeal was admitted on 06.03.2004 incorporating as many as 8 questions as substantial questions of law involved in the second appeal. They are as follows:

1. Whether the Appellant who is a party to Exhibits A1 and A4 is correct without following the rulings 1999-3 S.C.C 578 and 463 that under Section 114 (i)(g) of the Evidence Act where the 1st defendant/1st respondent herein who failed to enter into the witness and state his case on oath and does not offer himself to the cross examination, presumption would arise that the case set up by him is not correct?
2. Whether the lower appellate Court committed an error in allowing DW1 (son of 1st defendant and 3rd defendant himself) to let in evidence contrary to the terms and agreement contained in the recitals under Exs.A1 and A4, which is forbidden under Sections 91 and 92 of Evidence Act?
3. Whether Court below are correct in rendering the judgment by omitting to consider material evidence available in respect of the other pathway provided in Exs.A1 and A2 after taking cart and cattle to reach the respondents/defendants 1.40 acres in the north-west portion in suit filed 1007/A from his adjacent share in 215-C in Palayamkottai Road?
4. Whether the Court below is correct in its decision that when the right of way is restricted to foot passengers only, the right cannot be extended to right of way for carts and vehicles and as per the ruling I.L.R 1952-2-Raj 36 (39 and 40)?
5. Whether the lower Appellate Court failed to appreciate the legal position that when the defendants have got the way for taking carts and vehicles to their land of 1.40 acres in

S.F.1007/A, there cannot be any easement necessity over the property of the appellant?

6. Whether the judgment of the Courts are vitiated since the defendants have not proved their pleadings by any acceptable evidence and materials on record?
7. Whether the Courts below committed a jurisdictional error in not following the procedure contained under Order 25 Rule 10 CPC particularly when objections have been raised to the Commissioner's report by the appellants and violated the directions given by the Hon'ble Court as reported in 1996(1) M.L.J.426 (432)?
8. Whether the Courts below can accept the Commissioner's report without examining the Commissioner and for the cross examination and only thereafter report would form part of the record and evidence?"

In fact, all the questions formulated and included in the grounds of second appeal have been simply adopted in the order as the substantial questions of law involved in the second appeal.

7. The arguments advanced by Mr.D.Krishnakumar, learned counsel appearing on behalf of the appellant and by Mr.N.S.Sivakumar, learned counsel appearing on behalf of the respondent are heard. The judgments of the Courts below and the materials available on record are also perused.

8. The case of the plaintiff is very simple. At the time of partition under the original of Ex.A1, in the south-western portion which was allotted to him, a passage linking the south-eastern portion and the north western allotted to the defendants was provided to a width of 4 cuboid equivalent to 6 feet. It is the further case of the plaintiff that the same is the common passage jointly belonging to the plaintiff and the defendants and that hence he must be granted a declaration to the effect that the said passage of 6 feet wide more fully described in the plaint plan as "ABCD" jointly belongs to the plaintiff and the defendants. The respondents/defendants do not claim any exclusive right over the suit passage marked as "ABCD" in the plaint plan. They have also not disputed the plaintiff's contention that it was a common property left for the use of both parties. Under the said circumstances, the Courts below have not committed any error in holding that the plaintiff was entitled to a declaration of joint title of the plaintiff and the defendants in respect of the suit passage shown as "ABCD" in the plaint plan. As against that part of the decree, the defendants have not chosen to file any appeal or cross-objection

even before the lower appellate Court. Hence, the decree of the trial Court, which is confirmed by the lower appellate Court, so far as the relief of declaration is concerned, has attained finality and nothing can be convassed against it by the defendants in the second appeal. Hence, that part of the decree granted in favour of the plaintiff cannot be interfered with.

9. So far as the prayer for the relief of injunction is concerned, it has got two facets. The first one is that the suit passage is meant for taking men and cattle and it was never intended and it was never used for taking carts and other vehicles. The second one is that the defendants are trying to widen the passage and thereafter use the suit passage for taking their carts and vehicles from the south eastern plot to the north western plots belonging to the defendants. So far as the claim of the plaintiff that the suit passage was never used for taking carts or other vehicles is concerned, the finding of the Courts below is that such a contention was not substantiated by reliable evidence. However, the learned trial Judge and the learned lower appellate Judge came to the conclusion that the plaintiff was entitled to a permanent injunction restraining the defendants from obliterating or shifting the Bund and thereby widening the suit passage. Though the defendants might have denied the plaintiff allegations regarding the attempt to obliterate the ridge and widen the passage, the Courts below held that the apprehension was enough to grant the relief of injunction against the defendants not to widen the suit passage.

10. The defendants in their written statement have not denied and disputed the plaintiff averment that the suit passage as described in Ex.A1 was 6 feet wide. Whether carts and other vehicles can be taken through the said passage has not been considered. On the other hand, the learned trial Judge and the learned lower appellate Judge chose to hold that in any event the defendants could not be permitted to widen the passage beyond 6 feet. As against the said decree holding that the defendants were entitled to use the passage having only a width of 6 feet, the defendants have not chosen to file an appeal or cross-objection. On the other hand, it is the plaintiff who has come forward with the second appeal challenging the disallowed portion of his claim in his prayer for an injunction restraining the defendants from taking carts and other vehicles through the suit passage. Both the Courts below were of the view that 6 feet passage would be enough to take carts and the same was the reason why the Courts below declined the relief of injunction restraining the defendants from using the suit passage for taking carts and other vehicles. This Court does not find any defect or infirmity in the concurrent findings of the Courts below. At the same time the Courts below rightly held that the defendants should be restrained by a decree of injunction not to widen the passage beyond 6 feet by either obliterating or

shifting the field bund.

11. In view of the forgoing discussions, this Court comes to the conclusion that the trial Court and the lower appellate Court have not committed any error in refusing the relief of injunction restraining the defendants from taking carts and other vehicles through the suit passage and granting the limited injunction against the defendants not to widen the passage. All the questions, which have been formulated as substantial question of law, are in fact not the substantial questions of law involved in the second appeal and they do not warrant any answer in this second appeal. There is no merit in the second appeal and the same deserves dismissal.

12. In the result, the second appeal is dismissed. However, there shall be no order as to costs.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

gpa

To

1. The Sub-Judge,
Dharapuram
2. The District Munsif
Kangayam
3. The Section Officer,
VR Section
High Court, Madras

+1 cc to M/S.D.KrishnaKumar Advocate sr.54328
+1 cc to M/S.N.S.Sivakumar Advocates sr.54260

S.A.No.2222 of 2003

aa02/11/2015