

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 07.11.2016
PRONOUNCED ON : 17.11.2016

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S.A.No.158 of 2011
and
M.P.No.1 of 2011

1.Periasamy Gounder
2.Kolantha Gounder
3.Palanichamy Appellants/Defendants

Vs.

Arassapa Gounder ... Respondent/Plaintiff

Second Appeal is filed under Section 100 of Civil Procedure Code, to set aside the judgment and Decree dated 22.10.2007 made in A.S.No.34 of 2007 on the file of the Principal Sub-ordinate Judge at Gobichettipalayam, concurring the Judgment and decree dated 20.07.2006 in O.S.No.174 of 1999 on the file of the District Munsif at Gobichettipalayam and allow the second appeal.

For Appellants : Mr. M.Naraayanaswamy

For Respondent : Mr. V.P.K.Gowtham
for M/s.E.P.Senniangiri

JUDGMENT

Impugning the Judgement and decree dated 22.10.2007 passed in A.S.No.34 of 2007 on the file of the Principal Sub-ordinate Court, Gobichettipalayam, concurring with the Judgement and decree dated 20.07.2006 passed in O.S.No.174 of 1999, on the file of the District Munsif at Gobichettipalayam, the defendants have come forward with this second appeal.

2. The suit has been laid for permanent injunction.

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

The first item of the suit properties was allotted to the plaintiff in the partition effected between the plaintiff and the defendants on 26.06.1974 and the plaintiff and the defendants are brothers. The second item of the suit properties was purchased by the plaintiff and the defendants jointly and thereafter, as per the oral partition effected, the parties are in possession and enjoyment in respect of their shares. The

plaintiff is residing in the house put up in the second item of the suit properties and as depicted in the plan appended to the plaint, the plaintiff and his predecessor in interest have been using the Cart Track, shown in red colour in the plaint plan, to reach their house and properties and only through the said Cart Track, the plaintiff has been taking Cattle, Tractor, Lorry etc., and other than the said Cart Track pathway, the plaintiff has no other Cart Track to reach his house and properties. Thus the plaintiff has got claim over the Cart Track by way of grant and also exercising the right by way of easement of necessity and other than the Cart Track, there is no other Cart Track either for the plaintiff or for the defendants. The usage of the Cart Track by the plaintiff should not be obstructed by the defendants. While so, on account of enmity, the defendants have been interfering with the plaintiff's use and enjoyment of the common well and accordingly, the plaintiff preferred a complaint against the defendants that they are interfering with his enjoyment of the common well unlawfully and keeping the same in mind, the defendants have been unlawfully making attempts to obstruct the usage of the common Cart Track by the plaintiff to reach his house and properties. The defendants are not entitled to do so. Hence, the suit for permanent injunction.

4. The case of the defendants in brief are as follows:

The suit is not maintainable either in law or on facts. There is no connection whatsoever between the first item and the second item of the suit properties. The first item of the suit properties belonged to the parties ancestrally and as per the partition effected in the year 1974, the parties are enjoying their respective shares in the first item of the suit properties. There is no Cart Track as shown in the plaint plan. It is false to state that the plaintiff and his predecessor in interest have been using the Cart Track to reach their house and properties by taking cattle, tractor, lorry etc., and it is false to state that the plaintiff is entitled to use Cart Track by way of grant and also entitled to use the same as easement of necessity and it is false to state that other than the suit Cart Track, there is no other Cart Track for the usage of the plaintiff to reach his house and the properties. The parties are using only the Cart Track as given in the partition deed of the year 1974, other than the same, there is no other Cart Track as alleged by the plaintiff. It is false to state that after the purchase of the second item of the suit properties, the plaintiff and the defendants have been using the Cart Track to reach their respective properties. The plaintiff has not impleaded the owner of the properties adjacent to the suit properties and on that ground alone, the suit is bad for non joinder of necessary parties. Further, the plaintiff has also not included all the properties shown in the plaint plan. It is false to state that the defendants attempted to interfere with the plaintiff's usage of common well and that, the plaintiff preferred a police complaint against the defendants. It is false to state that the defendants are attempting to interfere

with the plaintiff's use and enjoyment of the suit Cart Track. The suit without prayer for declaration laid simpliciter for bare injunction is not maintainable. Hence, the suit is liable to be dismissed.

5. In support of the plaintiff's case, PWs 1 to 3 were examined and Exs. A1 to 7 were marked. On the side of the defendants', no oral evidence has been adduced and Ex. B1 has been marked. Exs. C1 to 4 were marked.

6. On a consideration of the oral and documentary evidence adduced by the respective parties, the trial Court was pleased to decree the suit as prayed for. The defendants preferred the first appeal and the first appellate court also, on a reappraisal of the evidence, was pleased to confirm the judgment and decree of the trial Court. Hence, the second appeal has been preferred by the defendants.

7. The suit has been laid by the plaintiff praying for an order of permanent injunction to restrain the defendants from preventing the plaintiff in using the Cart Track as depicted in the plaint plan as claimed in the plaint. The said Cart Track has also been described in the description of the suit properties. It is admitted that the plaintiff and the defendants are brothers. It is also admitted that the plaintiff and the defendants have divided their ancestral properties on 26.06.1974 under the partition deed, which has been marked as Ex. A1. Therefore, it could be seen that as per Ex. A1, the parties are entitled to enjoy their respective shares. In this connection, it could be seen that the courts below have found that even in the partition deed marked as Ex. A1, the existence of pathway has been mentioned. Further, according to the plaintiff, the second item of the suit properties was jointly purchased by the parties concerned and the same was also orally divided amongst themselves and accordingly, the parties are enjoying their respective shares. It is the specific case of the plaintiff that in order to reach his house put up in the second item of the suit properties and also the other properties, he and his predecessor in interest have been using the suit Cart Track from time immemorial and as such, the plaintiff is entitled to use the suit Cart Track both by way of grant as well as by way of easement of necessity. The courts below have found that in Ex. A2 also there is clear reference about the Cart Track for enabling the parties therein to reach their respective allotted shares and reserving the usage of common Cart Track for the access to their respective properties. It could be seen that the plaintiff and the defendants are enjoying their respective shares allotted to them under Ex. A1 and also as per the oral partition effected, pursuant to the purchase made under Ex. A2. Therefore, as rightly found by the courts below, only to ensure the usage of the said Cart Track, it is evident that the plaintiff has come forward with the present suit seeking for the relief of permanent injunction and

according to him, the defendants had unlawfully obstructed the usage of common passage on account of enmity.

8. To establish that the suit Cart Track is in existence and the same is the only Cart Track to reach his property, the plaintiff has also taken out a commission and accordingly, the advocate commissioner, who had inspected the property at the first instance, has submitted his report and plan, which have been marked as Exs.C1 and C2. A perusal of Exs.C1 and 2 would go to show that as pleaded by the plaintiff both in the plaint and in the evidence, it could be seen that the said Cart track is in existence and it is the only Cart Track for the plaintiff and others in the adjoining areas to reach their respective properties and other than the same, there is no other Cart Track. Therefore, as rightly found by the Courts below, Exs.C1 and C2 buttress the plaintiff's case about the existence and the usage of the common Cart Track as easement of necessity.

9. It appears that again, the commission was re-issued and the advocate commissioner had once again inspected the property and submitted his report and plan, which have been marked as Exs.C3 and 4. As per Exs.C3 and 4, it has been noted that another Cart Track has been pointed out by the defendants, shown in green colour, in the plan marked as Ex.C4, for the parties to enable their house and lands. However, as rightly found by the Courts below, a perusal of Ex.C3 and 4 cumulatively would go to show that the defendants, for the purpose of this case, have falsely created the new pathway shown in Ex.C3 and 4 and accordingly, it could be seen that even the advocate commissioner has noted that the new Cart Track is found to be of recent origin and there is no symptom or trace of usage of the same for a long time and the courts below have discussed about the same in extenso and therefore, it could be seen that the defendants, with a view to thwart the plaintiff's usage of the suit Cart Track, has created a new Cart Track, as if to show that other than the suit Cart Track, there is another Cart Track also for the plaintiff to reach his house and other properties. However, when it is found and has been found even by the advocate commissioner that the alleged new Cart Track, pointed out by the defendants, is of recent origin and there is no trace of the use of the same by any one, it is evident that the case of the defendants that the plaintiff is having another Cart Track for reaching his house and properties cannot be accepted in the eyes of law. Only to defeat the plaintiff's claim, right and common usage of the suit Cart Track, it could be seen that the defendants have, in a hurried manner with a view to deflect the attention of the Court to the real issue involved between the parties, has created the new Cart Track. However, they are unable to succeed in their attempt, in the face of the commissioner's report and plan marked as Exs.C3 and 4, and therefore, the contention of the defendants that the plaintiff is having another Cart Track to reach his property is found to be false.

10. On the other hand, it could be seen that other than the suit Cart Track, there is no Cart Track for the plaintiff and the other adjoining owners to reach their respective properties and therefore, it could be seen that as rightly found by the Courts below, the plaintiff has been in the common usage of the suit Cart Track as an easement of necessity for having access to his property.

11. Only an account of the same, it could be seen that the defendants, unable to resist the case of the plaintiff, has chosen not to adduce any oral evidence in support of their defence other than marking Ex.B1. The defendants have not adduced any evidence to establish their defence. No doubt, it is for the plaintiff, to establish his case by acceptable and reliable evidence. When the plaintiff has established his case through oral and documentary evidence marked by him and also, when his case has been further sustained by Exs.C1 to 4, it could be seen that other than the suit Cart Track, there is no other Cart Track to enable the plaintiff to reach his house and lands adjoining thereof. As rightly argued by the plaintiff, no claim of any exclusive right over the suit Cart Track is made by the plaintiff, other than the plaintiff's claim of easement of necessity for using Cart Track to have access to his property. Therefore, when the plaintiff has established his claim of easement of necessity, merely because, the plaintiff has not established his case of usage of the suit Cart Track by grant by itself would not disentitle the plaintiff to claim the relief sought for in the plaint.

12. It is also pleaded by the defendants that the plaintiff has not joined the other owners of the property adjoining the suit Cart Track and therefore, the suit is bad for non joinder of necessary parties. However, according to the plaintiff, inasmuch as it is only, the defendants, who had obstructed his usage of the suit Cart Track, he has been forced to file the suit against the defendants. Further, according him, the other adjoining owners have not made any resistance to the plaintiff in using the common Cart Track. Therefore, the plea of the defendants that the suit is bad for non joinder of the adjoining land owners falls to the ground.

13. The defendants have also raised the plea that the plaintiff without seeking the relief of declaration over the suit Cart Track is not entitled to maintain the suit simpliciter for permanent injunction. However, as rightly found by the courts below, when according to the plaintiff, the suit Cart Track is in existence as a common Cart Track for the adjoining land owners and when the defendants alone have obstructed his enjoyment to the use of the same and when the existence of the suit Cart Track and also, the fact that other than the suit Cart Track, there is no other Cart Tract to enable the plaintiff to reach his properties, have been established and when, as such,

there is no cloud over the title of the the suit Cart Tract, it could be seen that there is no need for the plaintiff to seek the relief of declaration and the suit laid for permanent injunction is maintainable. In this connection, it is found that the courts below have given convincing reasons for holding that the suit laid by the plaintiff simpliciter for permanent injunction is maintainable and there is no warrant to interfere with the findings of the Courts below.

14. In support of the defendants' case, the decision reported in 1971 (2) Supreme Court Cases 205 (Chapsibhai Dhanjibhai Danad V. Purushottam) is pressed into service. In support of the plaintiff's case, the decisions reported in 2007-2-L.W.445 (A.P.Kuppusamy & 5 others V. P.Kumarapalayam Municipality, P.Kumarapalayam rep.by its Commissioner P.Komarapalayam, Tiruchengode Tk), 2009-2-L.W.546 (Anathula Sudhakar V.P.Buchi Reddy (Dead) By Lrs & Ors), 2006-4-L.W.942 (Gurdev Kaur & others V. Kaki & Others), 1999-3-L.W.576 (Vidhyadhar V.Mankikrao & Anr), 2009-4-L.W.125 (Narayanan Rajendran & Another V. Lakshmy Sarojini & Others) and CDJ 2006 MHC 1851 (Kandasamy & Others V. Kolandasamy) are pressed into service. The Principles of Law enunciated in the above said decisions are taken into consideration and followed as applicable to the facts and circumstances of the present case.

In the light of the above discussions, I do not find any substantial question of law is involved in this second appeal. Hence, the second appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

सत्यमेव जयते Sub Assistant Registrar

sms

To

1. The Principal Sub-ordinate Judge,
Gobichettipalayam.

2. The District Munsif,
Gobichettipalayam.

+1cc to Mr.E.P.Senniangiri, Advocate, S.R.No.66606
+1cc to Mr.M.Naraayanaswamy, Advocate, S.R.No.66625

S.A.No.158 of 2011

VD(CO)
CA(04/01/2017)

<https://hcservices.ecourts.gov.in/hcservices/>